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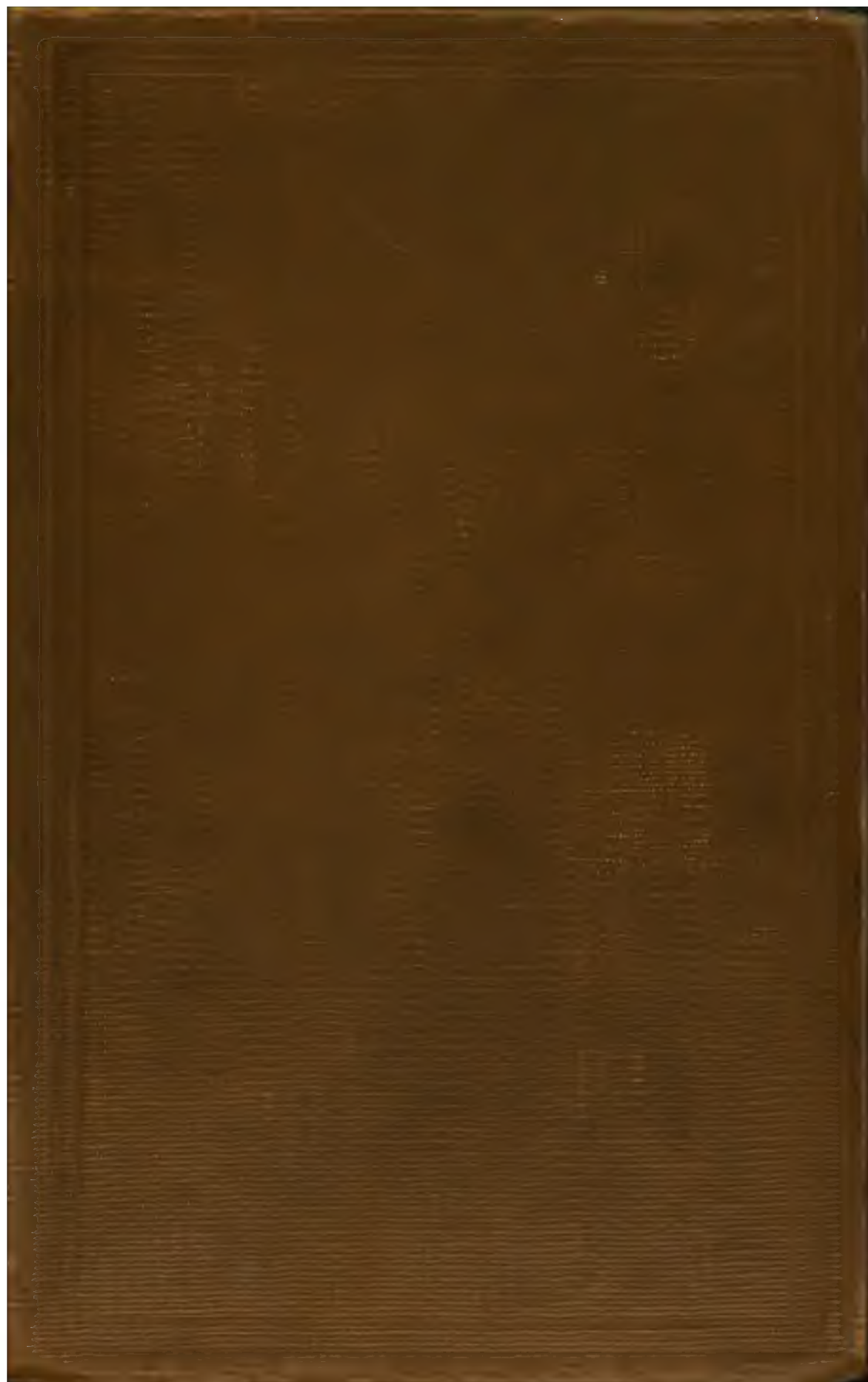
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HANDBOOK OF THE LAW OF TORTS



BY
H. GERALD CHAPIN, LL. M.

PROFESSOR OF LAW IN FORDHAM UNIVERSITY
AND IN NEW JERSEY LAW SCHOOL

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To
D. K. C. and M. G. C.

*my wife and my mother, I dedicate this work
written while actively engaged in practice and in
teaching, for to them is really due whatever has
been achieved.*

(v)*

PREFACE

THE author desires to acknowledge his indebtedness for many valuable suggestions to Professor George Chase, Dean of the Faculty of the New York Law School, who read much of this work while in proof. He wishes also to express his appreciation of the courtesy of Mr. Charles Walter Dumont, President of the American Law Book Company, who sanctioned resort to the author's article on "Torts" as heretofore published in "Cyc," and of the West Publishing Company, whose patience after he had exceeded the time set for completion enabled him to devote to this work greater care and thought.

H. GERALD CHAPIN.

DECEMBER 11, 1916.

(vii)*

TABLE OF CONTENTS

PART I GENERAL PRINCIPLES

CHAPTER I

THE TORT CONCEPT

Section		Page
1.	Definition	1-3
2-3.	Analysis of the Tort Concept	3
4.	Tort and Crime.....	4-7
5.	Violation of Moral Duties.....	7-11
6.	Assumption of Moral Duties.....	11-12
7-10.	Tort and Contract.....	12-32
11.	Statutory Torts.....	32-40
12.	Method of Violation—Act or Omission.....	40-42
13-14.	Method of Redress.....	42-47
15.	History and Bibliography.....	47-51
16.	Outline of the Present Work.....	51-52

CHAPTER II

GENERAL PRINCIPLES—LEGAL RESPONSIBILITY AS DE- PENDENT UPON CONDITION OF MIND AND PROOF OF DAMAGE

17.	Responsibility for Voluntary Acts.....	53-58
18.	Intent and Motive.....	58-59
19.	Mental Attitude of the Party Wronged.....	59
20.	Mental Attitude of the Wrongdoer.....	60
21.	Intent of Wrongdoer—Nature and Accomplishment of Act.....	60-63
22.	Intent of Wrongdoer as to Result.....	63-64
23.	Motive of Wrongdoer.....	64-67
24.	Legality Dependent on Motive.....	67-69
25.	Damage	69-76

CHAPTER III

**GENERAL PRINCIPLES (CONTINUED)—LIABILITY UNDER THE
LEGAL RULES DEFINING CAUSE AND EFFECT**

Section		Page
26.	Proximate Cause.....	76-79
27.	Intervention of Natural Force.....	79-81
28.	Fright and Mental Anguish.....	81-86
29.	Intervention of Voluntary Act or Neglect.....	86-91
30.	Intervention of Irresponsible Individual or Un- conscious Instrument.....	91-94
31.	Arbitrary Rule in Certain Cases of Fire.....	94-96
32.	Concurring Cause.....	97-100
33.	Accompanying Condition.....	101-103
34.	Functions of Court and Jury.....	103-104

CHAPTER IV

GENERAL PRINCIPLES (CONTINUED)—DEFENSES

35.	In General.....	105
36.	Inherent Defenses.....	105-117
	(1) Necessity	106-107
	(2) Acts of State.....	107-108
	(3) The Police Power.....	108-111
	(4) Illegal Conduct of Plaintiff.....	111-114
	(5) License	114-117
37.	Collateral Defenses.....	117-131
	(1) Abatement by Death.....	117-120
	(2) Accord and Satisfaction.....	120-123
	(3) Release and Covenant Not to Sue.....	123-127
	(4) Statutes of Limitation.....	127-131

CHAPTER V

GENERAL PRINCIPLES (CONTINUED)—PARTIES

38.	The Party Wronged.....	132-137
39.	The Wrongdoer—Several Liability—Personal Cul- pability	137
40.	Public Officers in General.....	138-142
41.	Judicial and Discretionary Acts.....	142-151
42.	Ministerial Acts.....	151-157
43.	Infants	157-161
44.	Insane Persons.....	162-165
45.	Husband and Wife.....	165-168
46.	Servants and Agents.....	169-175
47.	Masters	175-186
48.	Assumption of Risk.....	186-195

CHAPTER VI

GENERAL PRINCIPLES—PARTIES (CONTINUED)

Section		Page
49.	The Wrongdoer (Continued)—Several Liability—Imputed Culpability.....	196
50.	The State.....	196-197
51.	Corporations	198-208
52.	Employers	208
53.	Servants and Agents.....	209-214
54.	Independent Contractors.....	214-225
55.	Partners	225-227
56.	Owners	227-229
57.	Joint and Several Liability—How Arising.....	229-235
58.	Results	236-239

CHAPTER VII

GENERAL PRINCIPLES (CONCLUDED)—CONFLICT OF LAWS

59.	Local and Transitory Torts Distinguished.....	240-243
60.	Transitory Torts—Governing Rules.....	244-252

PART II

SPECIFIC TORTS

CHAPTER VIII

INFRINGEMENT OF PERSONAL SECURITY

61.	Assault	253-256
62.	Battery	257-258
63.	Assault and Battery—Defenses.....	258-272
64.	False Imprisonment.....	273-277
65.	Defenses	277-286
66.	Seduction	287

CHAPTER IX

Section	Page
THE RIGHT OF PRIVACY.....	288-291

CHAPTER X

INJURIES TO REPUTATION—DEFAMATION

68. Definition	292-296
69. Publication	296-303
70. Slander—When Damage Presumed.....	304-313
71. Libel—When Damage Presumed.....	314-316
72. Defamation with Special Damage.....	316-318
73. Complete Defenses.....	319-340
74. Partial Defenses.....	341-345

CHAPTER XI

INFRINGEMENT OF PRIVATE PROPERTY—TRESPASS

75. Definition	346-352
76. Right Invaded.....	353-356
77. Trespass ab Initio.....	356-357
78. Remedies	358-360
79. Defenses	360-364
80. Damages	365-369

CHAPTER XII

**INFRINGEMENT OF PRIVATE PROPERTY (CONTINUED)—
CONVERSION**

81. Definition	370-374
82. Method of Accomplishment.....	374-381
83. Quantum of Plaintiff's Interest.....	381-383
84. Defenses	384-385
85. Damages	386-388

CHAPTER XIII

INFRINGEMENT OF PRIVATE PROPERTY (CONTINUED)—WASTE

86. Definition	389-393
----------------------	---------

CHAPTER XIV

INFRINGEMENT OF PRIVATE PROPERTY (CONTINUED)— FRAUD

Section	Page
87. Definition	394-395
88. Elements	396-418
(1) Statement of Fact.....	397-403
(2) Intent to Cause Action.....	404-405
(3) Action by Complainant.....	405-409
(4) Falsity	410
(5) Scienter	410-416
(6) Damage	416-418

CHAPTER XV

INFRINGEMENT OF PRIVATE PROPERTY (CONTINUED)— SLANDER OF TITLE

89. Definition	419-420
90. Elements	420-423

CHAPTER XVI

INFRINGEMENT OF PRIVATE PROPERTY (CONTINUED)— INTERFERENCE WITH CONTRACTUAL RIGHTS

91. (I) Prospective Contracts of Employment.....	426-436
92. (II) Prospective Contracts Not of Employment.....	436-444
93. (III) Existing Contracts of Employment.....	444-449
94. (IV) Existing Contracts Not of Employment.....	449-456

CHAPTER XVII

INTERFERENCE WITH DOMESTIC RELATIONS

95. Injuries to the Husband.....	457-464
96. Injuries to the Wife.....	464-466
97. Injuries to the Parent.....	467-472
98. Injuries to the Master.....	473

CHAPTER XVIII

THE OBSTRUCTION AND PERVERSION OF LEGAL
REMEDIES

Section		Page
99.	Obstruction of Legal Remedies.....	474-476
100.	Perversion of Legal Remedies—Malicious Prosecution	476-493
101.	Malicious Use and Abuse of Process.....	493-495
102.	Unauthorized Suit in Another's Name.....	496
103.	Maintenance and Champerty.....	497-498

CHAPTER XIX

NEGLIGENCE

104.	Definition	499-501
105.	Elements—Duty to Exercise Care.....	501-503
106.	Duty of Occupant of Land.....	503-517
107.	Duty of Maker or Vendor of Chattel.....	517-520
108.	Duty of Keeper of Animals.....	520-523
109.	Standard of Care.....	523-527
110.	Of Innkeeper and Common Carrier.....	528-532
111.	Determining Standard of Care—Res Ipsa Loquitur..	532-539
112.	Damage	539-541
113.	Contributory Negligence.....	541-556

CHAPTER XX

NUISANCE

114.	Definition	557-559
115.	Public and Private Nuisances.....	560-563
116.	Nuisances per Se and per Accidens.....	564-570
117.	Remedies	571-579

CHAPTER XXI

CONSPIRACY

118.	Definition	580-584
------	------------------	---------

TABLE OF CASES CITED

(Page 585)

INDEX

(Page 675)

HANDBOOK

ON

THE LAW OF TORTS

PART I

GENERAL PRINCIPLES

CHAPTER I

THE TORT CONCEPT

1. Definition.
- 2-3. Analysis of the Tort Concept.
4. Tort and Crime.
5. Violation of Moral Duties.
6. Assumption of Moral Duties.
- 7-10. Tort and Contract.
11. Statutory Torts.
12. Method of Violation—Act or Omission.
- 13-14. Method of Redress.
15. History and Bibliography.
16. Outline of the Present Work.

DEFINITION

1. A tort is an unlawful violation of a private legal right, not created by contract, which gives rise to a common-law action for damages.

Derivation

The word "tort" (taken directly from the French) is derived from the Latin "torquere" to twist; "tortus" twisted or wrested aside. The metaphor is apparent. Tortious con-

duct is conduct which is crooked,¹ not straight.² As a synonym for "wrong" the word was at one time in common use.³

Other Definitions

A satisfactory definition of a tort has yet to be found. The difficulty, it has been well said, is due to the fact that "there is no such thing as a typical tort, an actual tort; that is to say, which contains all the elements entering into the rest. One tort is as perfect as another, and each tort differs from the others in its legal constituents."⁴ The elements necessary to constitute a cause of action for such wrongs as assault, defamation, deceit, and negligence are so radically different that it is difficult at first to perceive what they can possibly have in common, and although there are underlying principles common to all, yet a study of this subject must, to a large extent, require an examination into the specific rules applicable to each particular tort.

A favorite definition is "a wrong independent of contract."⁵ Others are "an act or omission, not a mere breach

¹ Cf. the colloquial "crook."

² Speaking of the law of Continental Europe, Professor Holland has observed that, "since conduct which is straightforward came to be spoken of eulogistically as being '*rectum*,' '*directum*' (whence '*droit*'), '*recht*,' and '*right*,' conduct of the opposite character naturally came to be expressed by the terms '*delictum*,' '*délit*,' as deviating from the right path, and '*wrong*' or '*tort*,' as twisted out of the straight line." Holland on Jurisprudence (10th Ed.) 318.

³ Thus we find it employed by Spenser in the "Faërie Queene" in the following passage in the fourth book:

"The lyon there did with the lamb consort,
And eke the dove sate by the faulcons side;
Ne each of other feared fraud or tort
But did in safe security abide."

⁴ Bigelow on Torts, 64. In 1882 Judge Finch, of the New York Court of Appeals, in *RICH v. NEW YORK CENT. & H. R. R. CO.*, 87 N. Y. 382, 390, Chapin Cas. Torts, 1, observed: "We have been unable to find any accurate and perfect definition of a tort. * * * The text-writers either avoid a definition entirely, or frame one plainly imperfect, or depend upon one which they concede to be inaccurate, but hold sufficient for judicial purposes."

⁵ Bouvier, L. Dict.; and see *Mobile Life Ins. Co. v. Randall*, 74 Ala. 170, 176; *Denning v. State*, 123 Cal. 316, 323, 55 Pac. 1000; *Louisville & N. R. Co. v. Spinks*, 104 Ga. 692, 694, 30 S. E. 968; *Barkley v. Williams*, 30 Misc. Rep. 687, 688, 64 N. Y. Supp. 318.

§ 3) NATURE AND SOURCE OF THE VIOLATED RIGHT 8

of contract, and producing injury to another, in the absence of any existing lawful relation of which the said act or omission is a natural outgrowth or incident." ⁶ "An act or omission giving rise, by virtue of the common-law jurisdiction of the court, to a civil remedy which is not an action on a contract." ⁷ "An act or omission which unlawfully violates a person's right created by the law, and for which the appropriate remedy is a common-law action for damages by the injured person." ⁸

Now it is evident that each of the foregoing, as well as the definition which we have given, invites rather than answers inquiry; but it will likewise be observed that all of them lay stress upon one or two important facts, which will now be considered. The remainder of this chapter will amount to but little else than an analysis and explanation of the definition which has been selected.

ANALYSIS OF THE TORT CONCEPT

2. This definition, when analyzed, will be found to require a consideration of the following:
 - (a) The nature and source of the right violated.
 - (b) The method of its violation.
 - (c) The method of redress.

NATURE AND SOURCE OF THE VIOLATED RIGHT

3. For a tort to exist it is essential that the wrongdoer should have failed to observe a duty which—
 - (a) He owed to the injured party, and
 - (b) Which was imposed by law.

⁶ "A proposed new definition of a tort," by F. H. Cooke, 12 *Harvard L. Rev.* 335, 336.

⁷ Jaggard on Torts, 2.

⁸ Burdick on Torts (3d Ed.) 12.

VIOLATION OF PUBLIC RIGHTS—TORT AND CRIME

4. The fact that a duty must have been owing to the injured individual shows the distinction between tort and crime. The former involves the idea of a private right violated, the latter of a public right; the tort is a wrong to the individual, the crime to the community. From this results further differences—
- (a) As to the mental attitude of the wrongdoer;
 - (b) As to the methods of redress.

The Character of the Party Injured

It is evident that, if A. should strike B., the act may be regarded from a double standpoint. On the one hand, there is an injury to B. B. should be compensated for his pain and suffering, and, if he has been incapacitated from attending to his business, an amount equivalent to his earnings should be paid to him. So, if A. should steal B.'s chattel, the wrongdoer should be compelled to pay its value, or to restore the specific article and pay damages for its detention. This is all that B. can expect. But, over and beyond this, the community as such has an interest in preventing the commission of acts which militate against the security of all. Self-preservation demands that organized society insist upon the observance of the principles which bind its members together and render life in common possible. Hence the duty which A. owes to the community to abstain from a breach of these rules having been violated, the imagination is not strained in considering that the state, as typifying the community, has been wronged as deeply as B.*

* "It is sometimes alleged by books of authority that the difference between a tort and a crime is a matter of procedure; the former being redressed by the civil, while the latter is punished by the criminal, courts. But the distinction lies deeper, and it is well expressed by Blackstone, who says that torts are an 'infringement or privation of the private, or civil, rights belonging to individuals considered as individuals; crimes are a breach of public rights and duties which affect the whole community considered as a community.' The right

It must not be inferred from the foregoing that tort and crime are convertible terms, for they are not. Treason, failing to respond to military duty, and in some states attempting suicide, are crimes, but not torts, while slander, malicious prosecution, and interference with contractual rights are generally regarded as torts, but not crimes.

Condition of Mind

Intention is of the very essence of criminal liability. "All crime exists primarily in the mind. A wrongful act and a wrongful intent must concur."¹⁰ This does not mean that the intent to accomplish the particular crime is always specifically to be proven. It may be found by the jury from the circumstances under which the act was committed.¹¹

Now it is not altogether true that intent is never involved in a tort; for instance, before a recovery can be had for fraud, it must be shown that there was a design on the part of defendant to mislead the plaintiff.¹² Generally, however, as will be more fully explained later, the law of torts does not depend upon intention.

The reason for this difference is obvious. The result of a criminal prosecution is punishment, and punishment cannot properly be inflicted where the culpable mind can neither be shown nor inferred. The result of an action for tort is compensation, and as between the injured party and the wrongdoer it is evident that the latter generally should bear the loss, be his state of mind what it may. The difference between these two theories is well illustrated in the following cases:

which is violated by a tort is always a different right from that which is violated by a crime. The person of inherence in the former case is an individual; in the latter case is the state." Holland on Jurisprudence (10th Ed.) p. 320; *Rhobidas v. City of Concord*, 70 N. H. 90, 116, 47 Atl. 82, 51 L. R. A. 381, 85 Am. St. Rep. 604; *Huntington v. Attrill*, 146 U. S. 657, 688, 13 Sup. Ct. 224, 36 L. Ed 1123.

¹⁰ *Gordon v. State*, 52 Ala. 308, 309, 23 Am. Rep. 575.

¹¹ *People v. Fish*, 125 N. Y. 136, 26 N. E. 319; *People v. Batting*, 49 How. Prac. (N. Y.) 392; *Commonwealth v. Hersey*, 2 Allen (Mass.) 173; *Crosby v. People*, 137 Ill. 325, 27 N. E. 49; *People v. Carter*, 96 Mich. 583, 56 N. W. 79; *United States v. Long* (O. C.) 30 Fed. 678.

¹² See *infra*, p. 410 et seq.

Suppose an infant of tender years, while playing with matches, start a fire and burn my house. He cannot be held guilty of the crime of arson. Nor, should a maniac wound me with a revolver, can he be punished for attempted homicide. But if infant or maniac possess an estate, it is only fair that I should be reimbursed for my injuries.¹³ Suppose A. point a pistol at B. The pistol is unloaded, but B. does not know this. It has been held that the act will not constitute criminal assault, since intention to shoot is necessarily lacking, though the courts are not in accord on this point. But, as B.'s right to a sense of personal security has been violated he can properly recover in tort.¹⁴ Again, if property stolen from A. is purchased from the thief by B. in the honest belief that the thief had title, B. cannot be convicted of larceny if he subsequently sell in good faith. But as by the act of selling he has exercised dominion over A.'s property in denial of the latter's right, he has committed the tort of conversion.¹⁵ Later on we shall discuss at length the mental attitude both of the party wronged and of the wrongdoer.

Redress

Redress for the crime assumes the form of punishment; redress for the tort, compensation. The method pursued in the former instance is a prosecution instituted by the community as such, in which the plaintiff is described as "The People of the State of _____," "The State of _____," "The Commonwealth of _____," or in England as "The King." In the case of a tort, it is an action brought directly by the injured party.

Merger

It has frequently been stated that by the common law of England, where the same act constituted both a tort and a felony, the private injury was deemed merged in the public wrong, and the reason suggested that, as conviction of a felony entailed the forfeiture of all the felon's lands and goods to the crown, any action in tort would prove fruitless. But it seems better to say that the private remedy was merely

¹³ See *infra*, pp. 157 et seq. (infants), 162 et seq. (insane persons).

¹⁴ Though the distinction is not universally admitted. See *infra*, p. 256.

¹⁵ See *infra*, p. 375.

stayed until public justice was satisfied, since in England "the party injured is relied upon to take the place of the public prosecutor, and his interest in the accomplishment of public justice is enlisted and kept alive by postponing the redress of his private grievance."¹⁶ The doctrine did not apply to misdemeanors, and in all probability it would not now be sustained by the English courts.

In the United States civil and criminal proceedings are kept separate. They may be begun simultaneously or successively, and the result of one will have no bearing upon the result of the other.¹⁷

VIOLATION OF MORAL DUTIES

5. That a mere moral duty has been disregarded, or a moral right violated, is not sufficient to give rise to an action for tort, where no legal right has been infringed.

Damnum Absque Injuria

There is a legal maxim that wherever there is a right the law will provide a remedy; but it must be evident upon re-

¹⁶ Cooley on Torts, p. 152; Crosby v. Leng, 12 East, 409; Pettingill v. Rideout, 6 N. H. 454, 25 Am. Dec. 473. "The source whence the doctrine took its rise in England is well known. By the ancient common law felony was punished by the death of the criminal and the forfeiture of all his lands to the crown. Inasmuch as an action at law against a person, whose body could not be taken in execution and whose property and effects belonged to the king, would be a useless and fruitless remedy, it was held to be merged in the public offense. Besides, no such remedy in favor of the citizen could be allowed without a direct interference with the royal prerogative. Therefore a party injured by a felony could originally obtain no recompense out of the estate of a felon, nor even the restitution of his own property, except, after the conviction of the offender, by a proceeding called an appeal of felony, which was long disused and wholly abolished by St. 59 Geo. III, c. 46, or under St. 21 Hen. VIII, c. 11, by which the judges were empowered to grant writs of restitution, if the felon was convicted on the evidence of the party injured, or of others by his procurement." Boston & W. R. Corp. v. Dana, 1 Gray (Mass.) 83, 97.

¹⁷ Williams v. Dickenson, 28 Fla. 90, 9 South. 847; Pettingill v. Rideout, 6 N. H. 454, 25 Am. Dec. 473; Boston & W. R. Corp. v. Dana, 1 Gray (Mass.) 83; Mairs v. Baltimore & O. R. Co., 175 N. Y.

flection that, however desirable it may be that law and morals should coincide, the courts cannot well undertake to enforce every obligation which conscience imposes. Emphasis must be laid upon the fact that to give a cause of action the right or duty violated must have been recognized by the law. No matter how great may be the damage suffered by the injured party, he cannot secure redress where such recognition is not given.

If I, standing on a pier, see my neighbor struggling in the water, no law requires me to throw him the life preserver which I hold in my hand. "If I know that a villain intends to defraud or in any way to injure my neighbor, it is doubtless my duty as a good citizen and as a Christian man to put him on his guard. But there is no rule of law which renders me liable for his loss in case of my neglect of the duty. It is a moral duty simply, not recognized by law."¹⁸ Suppose a master unjustifiably refuses to give to a servant a letter of recommendation or a certificate of character. The want of the letter or certificate may prevent the servant from procuring employment and may cause him infinite loss. Yet at common law the master owes to the servant no duty to furnish him such a statement, and the servant can maintain no action.¹⁹ Suppose A., knowing that B. is about to make a will

409, 67 N. E. 901; *Newton v. Porter*, 5 Lans. (N. Y.) 416 (affirmed in 69 N. Y. 133, 25 Am. Rep. 152); *Smith v. Lockwood*, 13 Barb. (N. Y.) 209. "Where the violation of a right admits of a civil and also of a criminal prosecution, the one is not merged in the other." Code Civ. Proc. N. Y. § 1899; *Story v. Hammond*, 4 Ohio, 376; *Ballew v. Alexander*, 6 Humph. (Tenn.) 433; *Allison v. President, etc., of Farmers' Bank of Virginia*, 6 Rand. (Va.) 204. "It is written on the hornbook of the law that the public and a party particularly aggrieved may each have a distinct, but concurrent, remedy for an act which happens to be both a public and a private wrong. Thus a person beaten may prosecute an action for the battery, while the commonwealth prosecutes an indictment for the breach of the peace, or a nuisance may be visited by indictment as a public wrong, while it is visited by action as a private injury; and for reasons equally good a libeler may be punished as a disturber of the peace, while he is made to respond in damages by the person libeled as a defamer of his character." Per Gibson, J., in *Foster v. Com.*, 8 Watts & S. (Pa.) 77, 79.

¹⁸ *Ohio & M. R. Co. v. Kasson*, 37 N. Y. 218, 224.

¹⁹ *Cleveland, C., C. & St. L. Ry. Co. v. Jenkins*, 174 Ill. 398, 51 N. E. 811, 62 L. R. A. 922, 66 Am. St. Rep. 296; *Carrol v. Bird*, 3-Esp. 201, 6 Rev. Rep. 824.

in favor of C., persuades him not to do so, or persuades B. to revoke a will already made. In what respect is C. injured? He had no existing right to the legacy, for until the testator's death he was merely the possible recipient of a mere gratuity.²⁰ Again, A. would have no cause of action against B. merely because the latter has purchased from A.'s debtor property which might have been applied to the payment of the debt and persuaded the debtor to abscond so long as A. had no lien by judgment or otherwise on the property.²¹

A physician is under no obligation to render professional services, and he will not be liable for arbitrarily refusing to respond to a call.²² Nor is there a right of action against a merchant for his refusal to sell goods.²³ In a recent case it was shown that plaintiff, while visiting the defendant's janitor, was taken violently ill. Defendant ordered her to leave, threatening that if she did not do so he would have her removed. In so doing he was held to have violated no legal duty to plaintiff, so as to render him liable for the aggravation of her illness consequent upon her leaving.²⁴

Illustrations of the principle are legion, and it would serve no useful purpose to multiply citations.²⁵ The maxim, "*Ex damno sine injuria non oritur actio*,"²⁶ applies. It may be readily understood, if we translate "*injuria*" as "*injury to a legal right*," giving to "damage" its ordinary meaning.

Torts Not Necessarily Moral Wrongs

Reversing the shield we find that many torts for which the law gives a cause of action are really not moral wrongs at

²⁰ *Marshall v. De Haven*, 209 Pa. 187, 58 Atl. 141; *Hutchins v. Hutchins*, 7 Hill (N. Y.) 104.

²¹ *Lamb v. Stone*, 11 Pick. (Mass.) 527; *Braem v. Merchants' Nat. Bank*, 127 N. Y. 508, 28 N. E. 597; *Hurwitz v. Hurwitz*, 10 Misc. Rep. 353, 31 N. Y. Supp. 25; *Klous v. Hennessey*, 13 R. I. 332; *Hall v. Eaton*, 25 Vt. 458. And see *infra*, p. 475.

²² *Hurley v. Eddingfield*, 156 Ind. 416, 59 N. E. 1058, 53 L. R. A. 135, 83 Am. St. Rep. 198.

²³ *Brewster v. Miller*, 101 Ky. 368, 41 S. W. 301, 19 Ky. Law Rep. 593, 38 L. R. A. 505.

²⁴ *Tucker v. Burt*, 152 Mich. 68, 115 N. W. 722, 17 L. R. A. (N. S.) 510.

²⁵ See 38 Cyc. 418 et seq., where further illustrations are given.

²⁶ "No cause of action arises out of damage without injury."

all. For instance, I shall be held accountable for the acts of my servant or agent, if done within the course of his employment, though I not only never sanctioned them, but expressly forbade their commission.²⁷ My horse may break his halter and wander upon my neighbor's land.²⁸ I may set off a blast and hurl a mass of rock upon his property.²⁹ A ferocious animal belonging to me may escape from his cage and bite a passer-by.³⁰ In all these cases I must respond in damages, though I have exercised all the care imaginable to prevent the harm.

So, too, if one agree to sell me a certain ox, he having one animal in mind and I another, and after paying the price I take possession of the ox which I believe I have bought, I have infringed his right of property, though I did so honestly.³¹ Again, if I purchase premises where there are some hot house plants which, contrary to my belief, do not belong to the seller, I will be liable if I refuse to deliver the plants, though the day after, learning that they are not my property, I offer to return them to the owner.³²

Unlawfulness of Violation

Although the statement may appear tautological, it is well to emphasize that the violation of the legal right must be unlawful. To strike another is an invasion of his right of personal security; but if in defense of self, or of one's property, it is excusable.³³ To destroy the house of another will ordinarily give rise to a cause of action; but houses may be torn down for the purpose of preventing the spread of a conflagration.³⁴ Entry upon another's land will usually constitute trespass; but entry is allowed when a highway becomes obstructed from temporary causes,³⁵ or where the party entering does so for the purpose of saving property in danger of loss by the elements.³⁶ In these and other cases the law, from motives of public policy and for the common good, will permit private rights to be overridden. The subject will

²⁷ See *infra*, p. 212.

²⁹ See *infra*, p. 346.

²⁸ See *infra*, p. 347.

³⁰ See *infra*, p. 521.

³¹ *Hobart v. Hagget*, 12 Me. 67, 28 Am. Dec. 159.

³² *CARPENTER v. MANHATTAN LIFE INS. CO.*, 22 Hun (N. Y.) 47, Chapln Cas. Torts, 200.

³³ See *infra*, pp. 258, 262.

³⁵ See *infra*, p. 107.

³⁴ See *infra*, p. 106.

³⁶ See *infra*, p. 107.

be discussed later, when we come to the defenses which may be interposed to the various tort actions.

ASSUMPTION OF MORAL DUTIES

6. Though a right be not primarily enforceable, yet if the corresponding duty be voluntarily assumed, the law may impose an obligation as to the method of performance.

Scope of Principle

At first blush this principle may seem self-contradictory, or at best to cover only cases of contract, but this is not so.

Take the case of a physician. No law, as we have seen, would compel him to give relief to the suffering. But if he undertake to treat a patient, and fail to exercise the proper degree of care and skill, he will be held accountable.³⁷ So, too, while a merchant may not be compelled to sell even to a starving man, yet if he does so, and the article contains a concealed defect, known to him, which renders its use imminently dangerous, his responsibility to the purchaser injured thereby is well established.³⁸

Suppose a trespasser on the tracks of a railroad company is injured without the fault of the company's employes, who leave him lying where he fell. There is here no liability resting upon the railroad. But assume, in addition, that the conductor and brakeman attempt to bind up his wounds, and do so in a brutal and bungling manner. Now, no duty required them to render any aid at all; but, having undertaken to do so, it is but fair that they should be held to the exercise of reasonable care.³⁹

So where plaintiff, an intoxicated passenger, is assisted by the conductor and trainman, on leaving the car, up a flight of

³⁷ *Randolph's Adm'r v. Snyder*, 139 Ky. 159, 129 S. W. 562. Also an attorney. *Lawall v. Groman*, 180 Pa. 532, 37 Atl. 98, 57 Am. St. Rep. 662.

³⁸ See *infra*, p. 517 et seq.

³⁹ *Union Pacific Ry. Co. v. Cappler*, 66 Kan. 649, 72 Pac. 281, 69 L. R. A. 513.

steps from the platform to the sidewalk. At about the fifth or sixth step they leave him, and he falls and is injured. Here, again, conductor and trainman were under no legal obligation to remove the plaintiff from the car or to provide for his safety; but they have undertaken to do so, and a duty assumed is not less than one imposed.⁴⁰ Indeed, the duty which is assumed need not, as will be seen when negligence is discussed, be a moral one. The circumstances are exceptional under which I would be required by any principle of ethics to invite a friend for a ride. But, having invited him, I become bound to take proper care in the management of the horse and vehicle.

VIOLATION OF CONTRACT DUTIES

7. As the duties whose violation constitute a tort are imposed by law irrespective of the volition of the parties, they must be distinguished from obligations which are assumed by agreement.

Tort and Contract

As has been intimated, the right violated must have been created and the corresponding duty imposed by law; for, if right or duty trace its origin to an agreement of the parties, the violation will not be viewed as a tort, but as a breach of contract. In the first case the consent of the parties does not enter into the question at all. If A. strike B., a cause of action is given, not because of any agreement upon A.'s part to refrain from the commission of this act, but because the right of personal security given by the law to B. has been violated. Indeed, B.'s permission that A. might strike him, as in cases of duels, would constitute no defense to a suit by B. against A., since there can be no valid consent to a breach of the peace.⁴¹ Hence, we repeat, to determine the form in which redress must be sought, whether in an action in tort or on contract, it is necessary to ascertain source or ori-

⁴⁰ *Black v. New York, N. H. & H. R. Co.*, 193 Mass. 448, 79 N. E. 797, 7 L. R. A. (N. S.) 148, 9 Ann. Cas. 485.

⁴¹ See *infra*, p. 116.

gin.⁴² If it be found that right or duty was created independent of the consent of the parties concerned, the action is in tort; if because of such consent, it is on contract.⁴³

Thus, where defendant had induced plaintiff to bid on the construction of a railway by promising to sell rails at a fixed figure, falsely representing that he had already procured the rails, it was held that any cause of action was on contract. Had defendant supplied the rails, there would have been no injury, and hence the promise could not be separated from the statement of fact. The damage was here caused by nonperformance, which was the gist of the action, not by the false representation.⁴⁴ So, where it was alleged that defendants had agreed with plaintiff to prepare the remains of the latter's husband for burial and shipment by a certain train, but failed to do so, the action was held one on contract; defendants being under no duty independent of the agreement to perform the obligation.⁴⁵ Applying the same test, we arrive at an identical result where a physician has contracted to treat a person's family for a year and refuses to attend when sent for. The cause of action is for breach of contract, and not for tort;⁴⁶ and the same is true where a tenant receives an

⁴² "In cases of tort the duty that has been violated is general. It is owed either to all our fellow subjects, or to some considerable class of them, and it is fixed by the law and the law alone. Here lies the difference between civil wrongs, properly so called, and breaches of contract. * * * But breach of contract, willful or not, is the breach of duties which the parties have fixed for themselves. Duties under a contract may have to be interpreted or supplemented by artificial rules of law; but they cannot be superseded while there is any contract in being. The duties broken by the commission of civil wrongs are fixed by law and independent of the will of the parties; and this is so, even where they arise out of circumstances in which the responsible party's own act has placed him." Pollock on Torts (7th Ed.) 2.

⁴³ 38 Cyc. 426.

⁴⁴ *Dawe v. Morris*, 149 Mass. 188, 21 N. E. 313, 4 L. R. A. 158, 14 Am. St. Rep. 404.

⁴⁵ *Newton v. Brook*, 134 Ala. 269, 32 South. 722.

⁴⁶ *Randolph's Adm'r v. Snyder* (1910) 139 Ky. 159, 129 S. W. 562; *Galveston, H. & S. A. R. Co. v. Hennegan*, 33 Tex. Civ. App. 314, 76 S. W. 452.

injury due to the landlord's failure to make repairs as he had contracted to do.⁴⁷

Tort Growing Out of and Coincident with Contract

Nevertheless suit may lie in tort, although the relationship existing between the parties is the result of contract; for it is well settled that tort may grow out of and be coincident with contract.

Take the case where plaintiff delivered a picture to defendant, who was to ascertain whether it was genuine. Defendant gave a receipt therefor, but, finding the picture to be spurious, refused to restore it, except on condition that plaintiff would acknowledge it to be a forgery, which plaintiff declined to do. Now, here the relationship of the parties primarily arose out of their agreement; but was the plaintiff obliged to resort to the agreement in order to establish any right for the violation of which he might recover? The fact remains that defendant was holding a picture which belonged to plaintiff, and how he obtained it is immaterial. His detention violates the plaintiff's right of property.⁴⁸ Again, where a treasurer receives moneys of a township, his relation with the township is certainly contractual, being that of debtor and creditor. But it is likewise true that the moneys belong to the township, and the treasurer has no more right to convert them to his own use than he has to take the town clock.⁴⁹

Suppose an employé does an illegal act within the scope of his duties, which causes injury to a third party. The employer may be held responsible, and, although there has been a violation of the contract of employment, he may in turn sue

⁴⁷ *Thompson v. Clemens*, 98 Md. 198, 53 Atl. 919, 60 L. R. A. 580; *Tuttle v. Gilbert Mfg. Co.*, 145 Mass. 169, 13 N. E. 465; *Dustin v. Curtis*, 74 N. H. 266, 67 Atl. 220, 11 L. R. A. (N. S.) 504, 13 Ann. Cas. 169; *Schick v. Fleischauer*, 26 App. Div. 210, 49 N. Y. Supp. 962. If, however, the landlord had undertaken the duty of making repairs, and had done so in an improper manner, he would, of course, have been responsible.

⁴⁸ *Bryant v. Herbert*, [1878] L. R. 3 C. P. D. 389, 47 L. J. C. P. 670, 39 L. T. Rep. (N. S.) 17.

⁴⁹ *Monroe v. Whipple*, 56 Mich. 516, 23 N. W. 202.

the employé, and recover from him the amount of the damages he has been forced to pay.⁵⁰

Put in another way, it can be said that, although the relationship between the parties is contractual, yet the law, apart from the terms of the contract, will cause certain rights and obligations to arise of a personal nature, the violation of which will be considered tortious. The contract is here the occasion and not the source of the right violated.

This principle has frequently been applied in actions against carriers. When A. purchases a ticket and takes his seat in the car, his right to insist upon the exercise of the highest degree of care and skill can be traced either to an agreement which he makes with the railroad at the time he purchases his ticket, an agreement none the less binding that it may not have been expressed in words, or to an obligation which the law places upon every carrier as such. If A. is injured, the railroad or steamship company having been negligent, or if he is ejected without proper cause, or treated with discourtesy, and elects to bring suit upon the former theory, his action is necessarily in contract. He may, however, prefer to sue for the violation of a common-law duty, which makes his action one of tort.⁵¹ A common carrier of goods is likewise under a duty created by law, independent of the contract which may have been entered into with the shipper.⁵²

⁵⁰ See *infra*, p. 238.

⁵¹ *City & Suburban Ry. Co. of Savannah v. Brauss*, 70 Ga. 368; *Nevin v. Pullman Palace Car Co.*, 106 Ill. 222, 46 Am. Rep. 688; *Runyan v. Central R. Co. of New Jersey*, 65 N. J. Law, 228, 47 Atl. 422; *Purcell v. Richmond & D. R. Co.*, 108 N. C. 414, 12 S. E. 954, 956, 12 L. R. A. 113; *Bretherton v. Wood*, 8 Brod. & Bing. 54. Thus, where the action was to recover damages for discourteous treatment of a passenger, it was said: "The relation between a carrier and its passenger is more than a mere contract relation, as it may exist in the absence of any contract whatsoever. Any person rightfully on the cars of a railroad company is entitled to protection by the carrier, and any breach of its duty in that respect is in the nature of a tort, and a recovery may be had in an action of tort, as well as for a breach of the contract." *Gillespie v. Brooklyn Heights R. Co.*, 178 N. Y. 347, 352, 70 N. E. 857, 66 L. R. A. 618, 102 Am. St. Rep. 503.

⁵² *Catlin v. Adirondack Co.*, 11 Abb. N. C. (N. Y.) 377; *Smith v. Seward*, 3 Pa. 342; *Central Trust Co. v. East Tennessee, V. & G. R. Co.* (D. C.) 70 Fed. 764; *St. Louis & N. A. R. Co. v. Wilson*, 85 Ark. 257,

No rights can apparently be more peculiarly contractual than those of master and servant, or principal and agent, and some of them, it is true, such as the right to wages, can be considered as contractual alone. But, once establish the relation of master and servant, and the law will, as in the case of carriers, cause certain rights to arise, although the contract may be silent respecting them. The master will, for example, be compelled to exercise reasonable care to furnish his servant with a safe place in which to work and with safe tools and appliances.⁵³ On the other hand, the servant or agent may be enabled to violate the legal rights of his master or principal in ways which, but for his position, he would have been unable to do. Thus, where a broker, employed to sell land, had reported to his employer an offer which was less than the offer he had actually received, with the intent to appropriate the difference, or to assist another to do so, it was an actionable wrong if the fraud succeeded, although "it is true that, but for the contract of agency, the concealment and misrepresentation might not be a tort."⁵⁴

Physician and patient,⁵⁵ attorney and client,⁵⁶ innkeeper and guest,⁵⁷ and bailor and bailee⁵⁸ are relations covered by

107 S. W. 978; *Mershon v. Hobensack*, 22 N. J. Law, 372; *Eckert v. Pennsylvania R. Co.*, 211 Pa. 267, 60 Atl. 781, 107 Am. St. Rep. 571; *Tattan v. Great West. R. Co.*, 2 Ell. & Ell. 844.

⁵³ *Kansas City, Ft. S. & M. R. Co. v. Becker*, 67 Ark. 1, 53 S. W. 407, 46 L. R. A. 814, 77 Am. St. Rep. 78; *Rincicotti v. John J. O'Brien Contracting Co.*, 77 Conn. 617, 60 Atl. 115, 69 L. R. A. 936; *Barnett & Record Co. v. Schlapka*, 208 Ill. 426, 70 N. E. 343; *Swo-boda v. Ward*, 40 Mich. 420; *Welle v. Celluloid Co.*, 175 N. Y. 401, 67 N. E. 609; *Rice v. King Philip Mills*, 144 Mass. 229, 11 N. E. 101, 59 Am. Rep. 80; *Burns v. Delaware & A. Telegraph & Telephone Co.*, 70 N. J. Law, 745, 59 Atl. 220, 592, 67 L. R. A. 956; *Vanesse v. Catsburg Coal Co.*, 159 Pa. 403, 28 Atl. 200. And see *infra*, p. 179 et seq.

⁵⁴ *Emmons v. Alvord*, 177 Mass. 466, 59 N. E. 126. And see *LAV-ERTY v. SNETHEN*, 68 N. Y. 522, 23 Am. Rep. 184, *Chapin Cas. Torts*, 191; *Haas v. Damon*, 9 Iowa, 589.

⁵⁵ *Lane v. Bolcourt*, 128 Ind. 420, 27 N. E. 1111, 25 Am. St. Rep. 442; *Nelson v. Harrington*, 72 Wis. 591, 40 N. W. 228, 1 L. R. A. 719, 7 Am. St. Rep. 900.

⁵⁶ *Lawall v. Groman*, 180 Pa. 532, 37 Atl. 98, 57 Am. St. Rep. 662.

⁵⁷ *De Wolf v. Ford*, 193 N. Y. 397, 86 N. E. 527, 21 L. R. A. (N. S.) 860, 127 Am. St. Rep. 969; *Clancy v. Barker*, 71 Neb. 83, 98 N. W.

⁵⁸ See *infra*, p. 378.

the foregoing rule. There may even be instances where the patient, client, guest, or bailor, who has been injured through the negligence or misconduct of the physician, attorney, innkeeper, or bailee, may be forced to sue in tort, as where the services were undertaken gratuitously, since no action could be maintained on contract, owing to the lack of consideration;⁵⁹ for, though one who undertakes to act without compensation will not be responsible for the failure to comply with his promise, he will still be responsible for an improper performance by which damage is caused.⁶⁰

Contract as an Element of Tort

A tort is none the less such because of the fact that a breach of contract may enter into and form a part of the cause of action, provided only that it can be said that the defendant has violated a right given to the plaintiff by law.

If, for example, I obtain goods from A., promising at the time to pay for them thirty days hence, and fail to do so, this is manifestly nothing more than a broken contract. But suppose that at the time of the purchase I had no intention of paying? When analyzed, the situation amounts to this: A. had a right of property in the goods. That right is violated, whether I take the goods forcibly or induce him to deliver them to me by a false representation of fact. My acquisition of the goods is as truly contrary to his will in the latter case as in the former. The condition of my mind at the time of the purchase is an existing fact. This I have misrepresented. Hence the conclusion is clear that in addition

440, 103 N. W. 446, 69 L. R. A. 642, 115 Am. St. Rep. 559, 8 Ann. Cas. 682; *Rommel v. Schambacher*, 120 Pa. 579, 11 Atl. 779, 6 Am. St. Rep. 732; *Curran v. Olson*, 88 Minn. 307, 92 N. W. 1124, 60 L. R. A. 733, 97 Am. St. Rep. 517.

⁵⁹ *Peck v. Hutchinson*, 88 Iowa, 320, 55 N. W. 511; *McCandless v. McWha*, 22 Pa. 261; (semble) *Du Bols v. Decker*, 130 N. Y. 325, 29 N. E. 313, 14 L. R. A. 429, 27 Am. St. Rep. 529.

⁶⁰ *Lawall v. Groman*, 180 Pa. 532, 37 Atl. 98, 57 Am. St. Rep. 662. Thus, where defendant gratuitously undertook to remove several hogsheads of brandy from one cellar to another, and broke one of the hogsheads through negligence, though a contract could not have been enforced, yet as a bailee he became liable for his misfeasance. *Coggs v. Bernard*, 2 Ld. Raym. 909, 1 Smith, Lead. Cas. 177, 92 Eng. Reprint, 107.

to the violation of a contractual right there is a tort,⁶¹ though in a sense the breach of contract may enter into the cause of action.

Again, if A. and B. have entered into a contract by which the latter is to render personal services to the former, and I maliciously induce B. to break his agreement, it is well settled that A.'s right to have B. perform is a property right, and I will be liable in tort.⁶²

So, too, "a breach of contract may be so intended and planned, so purposely fitted to time and circumstances and conditions, so inwoven into a scheme of oppression and fraud, so made to set in motion innocent causes which otherwise would not operate, as to cease to be a mere breach of contract, and become, in its association with the attendant circumstances, a tortious and wrongful act or omission."⁶³

CONTRACT AND TORT—PARTIES INJURED

8. Where a duty wholly contractual is violated the cause of action is limited strictly to the parties to the contract and those in privity with them. But privity is not essential to an action in tort by one specially injured by the act or omission constituting a breach of contract, where it also constitutes an invasion of a legal right existing in the plaintiff independently or concurrently with the contract.

Violation of Contractual Rights—Parties and Privies

The question whether a right is contractual or legal is not in any sense a purely academic one, for upon its answer may frequently depend the result of the action. It is obvious that,

⁶¹ *Nichols v. Pinner*, 18 N. Y. 295. And see *infra*, p. 397.

⁶² See *infra*, p. 444 et seq.

⁶³ Per Finch, J., *RICH v. NEW YORK CENT. & H. R. R. CO.*, 87 N. Y. 382, 398, *Chapin Cas. Torts*, 1. In this leading case it appeared that plaintiff owned property heavily mortgaged, which had depreciated by the removal of defendant's depot. In consideration of defendant's agreement to return the depot, plaintiff surrendered certain riparian rights. Because of his refusal to consent

if I by contract assume towards A. a duty which the law does not place upon me, it would be illogical to force me to perform that duty to B. unless A. should happen to have assigned his rights to B., B. should have otherwise succeeded to them, or, as some courts have held, the contract was expressly entered into for B.'s benefit.

One of the best examples of how a right purely contractual is confined to the parties is found in the celebrated case of *Winterbottom v. Wright*.⁶⁴ Here the defendant had contracted with the Postmaster General to provide mail coaches. Plaintiff's employer had contracted with the Postmaster General to supply horses and coachmen. Plaintiff was injured while driving a coach furnished by defendant. Now, any duty that defendant owed to provide safe coaches arose solely from his contract with the Postmaster General, to which plaintiff was neither party nor privy, and hence it is evident that he could have no cause of action. Again, a servant, while a passenger, is injured through the negligence of the railroad. The master, having lost the services of the servant, sues the railroad. How did the wrong arise? Manifestly out of the contract between the railroad and the servant, to which the master was not a party.⁶⁵ The same result follows where defendant, an attorney, is employed and paid by A. to examine and report as to the latter's title to a lot of ground. He certifies in writing that the title is good and the property

without compensation to the closing of a street, defendant maliciously broke its agreement and delayed the restoration of the depot to prevent plaintiff from warding off a foreclosure. It also instigated a sale by the mortgagee, at which the property was bid off for a small sum. Thereafter the street was closed and the depot restored; the mortgagee having been induced to waive all damages. It was held that the wrongful delay in restoring the depot was a breach of contract, but, outside of and beyond this, there was an actual and affirmative fraud, a scheme to accomplish a lawful purpose by unlawful means, and that this scheme of oppression and fraud, the breach of contract being only one of the elements, constituted a tort. See, also, *Oliver v. Perkins*, 92 Mich. 304, 52 N. W. 609.

⁶⁴ 11 L. J. Exch. 415, 10 M. & W. 109.

⁶⁵ *Alton v. Midland R. Co.*, 19 C. B. (N. S.) 213, 11 Jur. (N. S.) 672, 34 L. J. C. P. 292, 12 L. T. Rep. (N. S.) 703, 13 Wkly. Rep. 918, 115 E. C. L. 213.

unincumbered. Plaintiff, a third party, sees this certificate, and, relying upon it, loans money to A.⁶⁶ Nor will an insurance company, who has been compelled to pay insurance on the life of a party killed by defendant, have a cause of action.⁶⁷

Violation of Legal Duty Independent of Contract

We now come to the second branch of the rule, namely, that though there may exist a duty wholly contractual in its nature, nevertheless its violation may also amount to an invasion of the legal right of a third party. This does not in any sense militate against what has already been said concerning the enforcement of a contract solely by parties and privies. It is quite true that strangers cannot sue for a failure to perform it. But though there be a contract, yet the law may place upon a party the burden of acting in such a manner that he shall not harm others while carrying it out. "The question is: Has the defendant broken a duty apart from the contract? If he has merely broken his contract, none can sue him but a party to it; but if he has violated a duty to others, he is liable to them."⁶⁸ This rule has found frequent application in cases where one sells an article which he knows or may be presumed to have known is to be sold to or used by third persons, with knowledge that it is inherently danger-

⁶⁶ *National Savings Bank v. Ward*, 100 U. S. 195, 25 L. Ed. 621. For further illustrations, see *Curtin v. Somerset*, 140 Pa. 70, 21 Atl. 244, 12 L. R. A. 322, 23 Am. St. Rep. 220; *Iosee v. Clute*, 51 N. Y. 494, 10 Am. Rep. 638; *Conklin v. R. P. & J. H. Staats*, 70 N. J. Law, 771, 59 Atl. 144; *Galbraith v. Illinois Steel Co.*, 133 Fed. 485, 66 C. C. A. 359, 2 L. R. A. (N. S.) 799.

⁶⁷ "To open the door of legal redress to wrongs received through the mere voluntary and factitious relation of a contractor with the immediate subject of the injury would be to encourage collusion and extravagant contracts between men, by which the death of either through the involuntary default of others might be a source of splendid profits to the other, and would also invite a system of litigation more portentous than our jurisprudence has yet known." *Connecticut Mut. Life Ins. Co. v. New York & N. H. R. Co.*, 25 Conn. 265, 65 Am. Dec. 571, per Storrs, J. And see *Mobile Life Ins. Co. v. Brame*, 95 U. S. 754, 24 L. Ed. 580. The foregoing statement, al-

⁶⁸ *Peters v. Johnson*, 50 W. Va. 644, 647, 41 S. E. 190, 57 L. R. A. 428, 88 Am. St. Rep. 909.

ous by reason of hidden defects, particularly where he has taken steps to conceal the danger. Now, the duty of the seller is, of course, in a sense contractual. It rests upon his agreement of sale; and hence at first blush it would seem that, if the buyer in turn sells the article to one who is injured, the latter can maintain no action against the first vendor. The courts, however, have decided that there exists a duty on the part of the vendor to a subsequent purchaser or user of the article entirely distinct from the duty which he owed to the intermediate vendee. The injury to the last purchaser or user was a thing which the original vendor could reasonably have foreseen and anticipated. Take the case of one who manufactures a land roller, the tongue of which contains a knot which he conceals with putty and paint, so that the defect cannot be seen on inspection. This he sells to one who in turn sells the article to the plaintiff.⁶⁹ Can it be said that he owed no duty to the one who finally purchased the roller and who suffered injury by reason of the willful and fraudulent concealment? True, he owed none by contract; but is there not a general obligation imposed upon every man to refrain from acts which he knew or should have known would in the natural course of events cause injury to another? This duty has been broadly stated as follows: "Whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that, if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause danger or injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger."⁷⁰ This rule has been applied

though true of the facts involved, appears too broad. A tort may exist, though the damage would not have been suffered, had a contract not existed between the sufferer and a third party. Thus one who deposits on a highway stone, earth, and rubbish, and thereby causes injury to one having a contract with the town to keep the highway in repair, is liable for such damage. *McNary v. Chamberlain*, 34 Conn. 384, 91 Am. Dec. 732.

⁶⁹ *Kuelling v. Roderick Lean Mfg. Co.*, 183 N. Y. 78, 75 N. E. 1098, 2 L. R. A. (N. S.) 303, 111 Am. St. Rep. 691, 5 Ann. Cas. 124.

⁷⁰ Per Brett, M. R., in *Heaven v. Pender*, 11 Q. B. D. 503, 47 J. P.

where poison was sold, labeled as a harmless medicine,⁷¹ and illuminating oil, which was explosive through inherent defects,⁷² and in other cases which will be discussed when we consider the liability of the vendor of goods. Of course, there can be no question, even on contract, where the purchaser is shown to be the actual agent of the injured party.⁷³

Furthermore, as has already been intimated, the fact that one is under contract properly to perform a certain duty will not exempt him from liability for his invasion of the rights of the third party while attempting to perform it. "If the agent once undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequence of his acts."⁷⁴ In cases such as this there is an essential difference between not acting and acting improperly. True, the servant or agent cannot be compelled by a third party to undertake the work; but it is very different from the right which the third party has to insist that the work be performed in such a manner as not to injure him.

ELECTION BETWEEN TORT AND CONTRACT

9. In many cases the injured party has his election to waive the tort and sue on contract, or to waive the contract and sue in tort.

Waiving the Contract

As we have already seen, the violated duty may have been imposed both by contract and by law. Thus the passenger,

709, 52 L. J. Q. B. 702, 49 L. T. Rep. (N. S.) 357, where a defective staging was sold to plaintiff's employer.

⁷¹ Thomas v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455.

⁷² Wellington v. Downer Kerosene Oil Co., 104 Mass. 64; Riggs v. Standard Oil Co. (C. C.) 130 Fed. 199.

⁷³ George v. Skivington, L. R. 5 Exch. 1, 39 L. J. Exch. 8, 21 L. T. Rep. (N. S.) 495; Langridge v. Levy, 6 L. J. Exch. 137, 2 M. & W. 519.

⁷⁴ Osborne v. Morgan, 130 Mass. 102, 39 Am. Rep. 439. Here the agent was held liable for damage due to the fall of a tackle block and chain which he had allowed to remain in such a manner that

client, or patient may proceed against carrier, attorney, or physician in many cases on either theory. So, too, if the seller falsely warrants his title to or the soundness of the article sold, it is a breach of contract; and if the statement is known to him at the time to be false, it is a tort as well.⁷⁵ Of course, if the vendee sue on the latter theory, he sets up a cause of action which is more difficult to prove, since he must show the defendant's guilty knowledge.⁷⁶

If a sale of goods is induced by fraudulent representations on the part of the vendee, the vendor likewise has a choice of remedies. He may disaffirm the sale, treat the contract as rescinded, and bring a proceeding in replevin to recover the goods, or he can treat the contract as subsisting and sue for the price.⁷⁷

If a bank without just cause refuse to honor a depositor's check, the latter may sue, it is true, for breach of contract; but he may also proceed in tort for what is regarded as a slander upon the depositor's credit.⁷⁸ The latter theory is generally better for the plaintiff. Suppose the check were only for five dollars. If plaintiff has elected to proceed on the theory of a breach of contract, his damages will be the five dollars and interest, provided that the check remain unpaid, and if it has subsequently been paid his recovery can be but nominal. But, on the other hand, if the wrong is to be considered as a slander upon the depositor's credit, it is evident that where the latter is a trader, and perhaps in other cases, the smaller the check the greater the slander.⁷⁹

they were likely to cause injury. And see *Southern R. Co. v. Grizzle*, 124 Ga. 735, 53 S. E. 244, 110 Am. St. Rep. 191. In *Rice v. Yocum*, 155 Pa. 538, 26 Atl. 698, the servant or agent had unlawfully taken a machine belonging to plaintiff and turned it over to his principal.

⁷⁵ See *infra*, p. 410 et seq.

⁷⁶ *Ross v. Mather*, 51 N. Y. 108, 10 Am. Rep. 562.

⁷⁷ *Hellbronn v. Herzog*, 165 N. Y. 98, 58 N. E. 759.

⁷⁸ *Atlanta Nat. Bank v. Davis*, 96 Ga. 334, 23 S. E. 190, 51 Am. St. Rep. 139; *J. M. James Co. v. Continental Nat. Bank*, 105 Tenn. 1, 58 S. W. 261, 51 L. R. A. 255, 80 Am. St. Rep. 857; *Davis v. Standard Nat. Bank*, 50 App. Div. 210, 63 N. Y. Supp. 764.

⁷⁹ In *Atlanta Nat. Bank v. Davis*, 96 Ga. 334, 23 S. E. 190, 51 Am.

Again, if property is intrusted to another for a consideration, to be cared for, used, repaired, or for other purposes, to be later returned, and it is negligently injured, the owner may proceed on the theory of a breach of contract; but he may likewise sue in tort.⁸⁰

Quasi Tort

This term has sometimes been adopted to designate cases coming within the foregoing class. Thus, in an action against a railroad for injuries received by a passenger, Lindley, L. J., observed that: "Every one who has studied the English law will know perfectly well that there is debatable ground between torts and contracts. There are what are called quasi contracts and quasi torts; and it is sometimes not easy to say whether a cause is founded on contract or on tort. Very often a cause of action may be treated either as a breach of contract or as a tort."⁸¹ Though the expression has often been used by text-writers,⁸² it has not as yet appeared to any extent in the decisions, nor does its exact significance seem to have been definitely determined.

St. Rep. 139, a check for \$12.48 was returned unpaid through a clerical error. The bank apologized to its depositor and wrote a special letter to the payee, explaining the circumstance. Though special damages were not proved, a verdict for \$200 was sustained on appeal. In *Schaffner v. Ehrman*, 139 Ill. 109, 28 N. E. 917, 15 L. R. A. 134, 32 Am. St. Rep. 192, under practically the same state of facts, the check being for \$249, the recovery was for \$450. In *Birchall v. Third Nat. Bank*, 15 Wkly. Notes Cas. (Pa.) 174, where there were two checks, for \$68 and \$250, respectively, a verdict for \$1,000 was considered excessive and was reduced to \$600. But in New York it has been held that in the absence of proof of special damage or malice a recovery will be limited to nominal damages. *T. B. Clark Co. v. Mt. Morris Bank*, 85 App. Div. 362, 83 N. Y. Supp. 447, 117 N. Y. St. Rep. 447. Cf. *Davis v. Standard Nat. Bank*, 50 App. Div. 210, 63 N. Y. Supp. 764.

⁸⁰ One who, having in his charge the horse of another to keep and use, without the exercise of proper care lets him on a very hot day to a stranger, who overdrives him so as to cause his death, may be found to be liable either on a count in contract for breach of an agreement to keep and use the horse carefully, or on a count in tort for negligently keeping and using it. *Pelton v. Nichols*, 180 Mass. 245, 62 N. E. 1.

⁸¹ *Taylor v. Manchester S. & L. R. Co.*, [1895] Q. B. D. 134, 138.

⁸² See *Jaggard on Torts*, p. 22; *Burdick on Torts* (3d Ed.) p. 32.

Advantage of Suing in Tort

Generally speaking, it will be more advantageous for the injured party to proceed on the theory of tort rather than in contract. Two reasons should be particularly noted: First, the damages may be greater; second, the method of redress may be more complete. "In actions on contract, except promises to marry, the amount recoverable is limited to the actual damages caused by the breach; the measure being the same whether the defendant fails to comply with his contract through inability or willfully refuses to perform it. But in torts the rule is different. The motive of the defendant becomes material. In those that are committed through mistake, ignorance, or mere negligence, the ordinary rule is mere compensation; but in such as are committed willfully, maliciously, or so negligently as to indicate a wanton disregard of the rights of others, the jury are not restricted to compensation merely. They may, if the evidence justifies it, give vindictive or exemplary damages, such as will not only compensate the injured party, but at the same time tend to prevent a repetition of the wrong either by the defendant or others."⁸⁸

The method of redress may be more effective, for the reason that, in actions for tort, the plaintiff under the procedure in many states is entitled to an order of arrest, by means of which the defendant will be held to abide the event of the action, and, should a judgment finally be rendered against him, an execution against his person may be issued. But in ac-

⁸⁸ Per Sterrett, J., in *Pittsburgh, C. & St. L. Ry. Co. v. Lyon*, 123 Pa. 140, 150, 16 Atl. 607, 609, 2 L. R. A. 489, 10 Am. St. Rep. 517. And see *Davis v. Standard Nat. Bank*, 50 App. Div. 210, 63 N. Y. Supp. 764. It has been intimated, however, that in actions by passengers against railroads, though on contract, exemplary damages may be recovered where they would be allowed had suit been brought in tort. *Alabama Great Southern R. Co. v. Sellers*, 93 Ala. 9, 9 South. 375, 30 Am. St. Rep. 17; *Memphis & C. Packet Co. v. Nagel*, 97 Ky. 9, 29 S. W. 743, 16 Ky. Law Rep. 748; *Morrison v. The John L. Stephens*, 17 Fed. Cas. 838, No. 9,847. But this seems open to question. The better rule is that punitive damages are given only when the action is brought as for a tort. *Trout v. Watkins Livery & Undertaking Co.*, 148 Mo. App. 621, 130 S. W. 136; *Sutherland on Damages*, § 99.

tions on contract, with a few exceptions, as where a debt was fraudulently contracted, this is usually not permitted.⁸⁴

Waiving Tort and Suing on Contract

Outside of the cases already alluded to, there are others in which the injured party may make his election. Here, although the injury may primarily be regarded as a tort, he may nevertheless treat it as a breach of a theoretical contract. In other words, from the existence of certain facts the law will imply a promise on the part of the wrongdoer to make compensation, although he has actually made no promise to that effect.⁸⁵ Cases in which this doctrine is most frequently applied are those where the defendant has wrongfully appropriated plaintiff's property. Suppose A. unlawfully takes a diamond belonging to B., which he sells to C. The taking was an invasion of B.'s property rights, and B. may sue A. for the tort conversion, recovering the value of the diamond at the time of the taking.⁸⁶ As against C., B. may likewise recover either the diamond itself, since A. could transfer no greater title than he had, or its value, though, as it is held in some states, only after a demand made upon C. and a refusal by the latter to return.⁸⁷ But, assuming that, owing to market fluctuations, the value of the diamond at the time it was taken was but small in comparison with the price for which A. sold it, it would be unfair to permit A. to enrich himself by means of his own wrong at B.'s expense, for which reason B. should be allowed to treat A. as his agent and recover the price which the latter has obtained, in an action

⁸⁴ See Comp. Laws Mich. §§ 9996, 9998; Code Civ. Proc. N. Y. §§ 549, 1487.

⁸⁵ "From certain acts or omissions of a party creating a liability to make compensation in damages the law implies a promise to pay such compensation. Whenever this is so, and the acts or omissions are at the same time tortious, the twofold aspect of the single liability at once follows, and the injured party may treat it as arising from the tort, and enforce it by an action setting forth the tortious acts or defaults, or may treat it as arising from an implied contract, and enforce it by an action setting forth the facts from which the promise is inferred by the law." Pomeroy on Remedies and Remedial Rights, § 568.

⁸⁶ See *infra*, p. 374.

⁸⁷ See *infra*, p. 375.

on contract for money had and received.⁸⁸ If the thief has not sold or disposed of the property, but retains it in his possession, the courts are not in accord whether the owner may sue on an implied contract of sale to the wrongdoer. The weight of authority apparently is that he can.⁸⁹ But other courts have adopted a contrary doctrine.⁹⁰

Following this principle, the Supreme Court of Wisconsin, after a careful analysis of the doctrine, held that, where the cattle of defendant had trespassed upon plaintiff's lands, a suit might be sustained in implied contract for the value of the pasturage.⁹¹ This was evidently on the theory that the tortfeasor was enriched, for ordinarily an action cannot be brought on contract for a naked trespass to land in the absence of a statute permitting it.⁹²

Another illustration is supplied by cases holding that, where money or property has been obtained by fraud,⁹³ or duress,⁹⁴ an action will lie in contract.

Now, the limits of the principle are apparent. The defendant has enriched himself unjustly. It must be a case

⁸⁸ *Cragg v. Arendale*, 113 Ga. 181, 38 S. E. 399; *Howe v. Clancey*, 53 Me. 130; *Dallas v. Koehler Sporting Goods Co.*, 86 N. J. Law, 651, 92 Atl. 356; *Harpending v. Shoemaker*, 37 Barb. (N. Y.) 270; *Small v. Robinson*, 9 Hun (N. Y.) 418; *Brittain v. Payne*, 118 N. C. 989, 24 S. E. 711.

⁸⁹ *Roberts v. Evans*, 43 Cal. 380; *City of Elgin v. Joslyn*, 136 Ill. 525, 26 N. E. 1090; *Aldine Mfg. Co. v. Barnard*, 84 Mich. 632, 48 N. W. 280 (semble). And see *Tolan v. Hodgehoom*, 38 Mich. 624; *Watson v. Stever*, 25 Mich. 386; *Gordon v. Bruner*, 49 Mo. 570; *TERRY v. MUNGER*, 121 N. Y. 161, 24 N. E. 272, 8 L. R. A. 216, 18 Am. St. Rep. 803, Chapin Cas. Torts, 8.

⁹⁰ *Cragg v. Arendale*, 113 Ga. 181, 38 S. E. 399; *Moses v. Arnold*, 43 Iowa, 187, 22 Am. Rep. 239; *Jones v. Hoar*, 5 Pick. (Mass.) 285; *Willet v. Willet*, 3 Watts (Pa.) 277.

⁹¹ *Norden v. Jones*, 33 Wis. 600, 14 Am. Rep. 782.

⁹² See *St. John v. Antrim Iron Co.*, 122 Mich. 68, 80 N. W. 998; *Downs v. Finnegan*, 58 Minn. 112, 59 N. W. 981, 49 Am. St. Rep. 488; *Fanson v. Linsley*, 20 Kan. 235.

⁹³ *Dashaway Ass'n v. Rogers*, 79 Cal. 211, 21 Pac. 742; *Cory v. Board of Chosen Freeholders of Somerset County*, 47 N. J. Law, 181; *Byxbie v. Wood*, 24 N. Y. 607; *Western Assur. Co. v. Towle*, 65 Wis. 247, 26 N. W. 104.

⁹⁴ *Chandler v. Sanger*, 114 Mass. 364, 19 Am. Rep. 367.

where he is "under an obligation from the ties of natural justice to refund." Then "the law implies a debt and gives this action, founded in the equity of the plaintiff's case, as it were upon a contract—'*quasi ex contractu*,' as the Roman law expresses it." ⁹⁵

The distinction between cases such as the foregoing and those where the remedy is obviously in tort alone, such as assault and battery, slander, or libel, can readily be perceived. The theory upon which the former proceed is that the promise may be implied, and when the promise is implied it is "because the party intended it should be, or because natural justice plainly requires it *in consideration of some benefit received*." ⁹⁶ Certainly the mere "duty to pay damages for a tort does not imply a promise to pay them." ⁹⁷ Hence, "assuming a defendant to be a tort-feasor, in order that the doctrine of waiver of tort may apply, the defendant must have unjustly enriched himself thereby. That the plaintiff has been impoverished by the tort is not sufficient. If the plaintiff's claim, then, is in reality to recover damages for an injury done, his sole remedy is to sue for tort." ⁹⁸

Nor is the difference between contract and quasi contract less marked. Assent is of the essence of the first, whether shown by words or by acts. The evidence to prove the agreement may be different; but the willingness to assume the obligation must be shown. On the other hand in quasi contract, not only does defendant's obligation "not depend in any case upon his assent, but in many cases exists notwithstanding his dissent." ⁹⁹

⁹⁵ Per Lord Mansfield, in *Moses v. Macferlan*, 2 Burr. 1005, 1008.

⁹⁶ Per Mellen, C. J., in *Webster v. Drinkwater*, 5 Me. 319, 322, 17 Am. Dec. 238.

⁹⁷ Per Allen, J., in *Cooper v. Cooper*, 147 Mass. 370, 373, 17 N. E. 892, 9 Am. St. Rep. 721; *Bigby v. United States*, 188 U. S. 400, 409, 23 Sup. Ct. 468, 47 L. Ed. 519.

⁹⁸ Keener on Quasi Contracts, p. 160. And see *New York Guaranty & Indemnity Co. v. Gleason*, 78 N. Y. 503; *National Trust Co. v. Gleason*, 77 N. Y. 400, 33 Am. Rep. 632; *Fanson v. Linsley*, 20 Kan. 235.

⁹⁹ Keener on Quasi Contracts, p. 3.

**ELECTION BETWEEN TORT AND CONTRACT—
CREATING CAUSE OF ACTION**

10. The party wronged cannot, merely by waiving what is essentially a tort, create a cause of action in contract, nor, by waiving what is essentially a cause of action in contract, create a tort.

Rule Applied

The word "*create*" should be emphasized. We have hitherto pointed out the essential differences between the contract and tort concept, and have noted the border-line cases where suit may be brought on either theory, as well as those of quasi contracts arising by pure implication of law. But, however clear the distinction may be between the two classes of rights, the line of demarcation is in fact by no means well defined, and many cases exist showing a failure of counsel to view the cause of action from a proper standpoint. One of the leading decisions is found in *Bigby v. United States*.¹⁰⁰ Here plaintiff had been injured in an elevator operated in a federal building. The jurisdiction of the United States Court of Claims did not cover cases of tort; but it did extend to cases of "contract expressed or implied." Plaintiff's contention was that he might sue on an implied contract with the government to carry him safely, analogous to that of the common carrier; but the wrong, if any, was held to be a pure tort founded on negligence.¹⁰¹

On the other hand, it is equally well settled that "the plaintiff cannot, by changing the form of his action, change the nature of the defendant's obligation, and convert that into a tort which the law deems to be a simple breach of an agreement."¹⁰² Thus, where a reorganization agreement made by the bondholders of an insolvent railway company confers up-

¹⁰⁰ 188 U. S. 400, 23 Sup. Ct. 468, 47 L. Ed. 519.

¹⁰¹ And see, for further illustrations, *Cooper v. Cooper*, 147 Mass. 370, 17 N. E. 892, 9 Am. St. Rep. 721; *Raymond v. Lowe*, 87 Me. 329, 32 Atl. 964; *Noyes v. Loring*, 55 Me. 408; *St. John v. Antrim Iron Co.*, 122 Mich. 68, 80 N. W. 998; *North Haverill Water Co. v. Metcalf*, 63 N. H. 427.

¹⁰² Per Brown, J., in *Walter v. Bennett*, 16 N. Y. 250, 252.

on a committee the title to the bonds, authorizing them to prepare a plan of reorganization and give notice thereof to the bondholders, so that any of them might withdraw from the agreement if the plan should not be satisfactory, with further power in the committee to form a new corporation and use the bonds for the purpose of purchasing any of the assets and franchises of the old company, an action against the members of the committee for using the bonds to pay the purchase price of the railway's property bid in by them, without first making a plan of reorganization and giving notice thereof, must be brought for breach of contract; there being no wrong to be redressed on the theory of tort.¹⁰³ It was here pointed out that the wrong, if any, for which a bondholder might bring his action, consisted in the one fact of the failure to file a plan of reorganization. In so doing the committee violated the reorganization agreement, and whatever responsibility attached to them was based on and limited thereby. So, where a contract made with an agent requires him to guarantee all sales and to remit the proceeds thereof, the agent's failure to collect the amounts due from the purchasers is not a tort. The principal's remedy is by suit on the guaranty.¹⁰⁴

But perhaps the rule is best illustrated where relief has been unsuccessfully sought in tort in actions founded on allegations of fraud. As will be seen later,¹⁰⁵ in order that this tort must exist, it is necessary that the fraudulent representations under which plaintiff was induced to act relate to past or existing facts. A mere promise or declaration of intention will not be sufficient, unless there was no design on defendant's part at the time to perform it. To hold otherwise would plainly destroy all distinction between tort and contract. Hence, where defendant had obtained plaintiff's signature to a note by certain representations as to what would be done with the proceeds,¹⁰⁶ or to an assignment of patent

¹⁰³ *Industrial & General Trust v. Tod*, 170 N. Y. 233, 63 N. E. 285.

¹⁰⁴ *Standard Fertilizer Co. v. Van Valkenburgh*, 21 Misc. Rep. 559, 47 N. Y. Supp. 703.

¹⁰⁵ See *infra*, p. 397.

¹⁰⁶ *Dickinson v. Atkins*, 100 Ill. App. 401.

rights, royalties, etc., by promising to furnish funds for the purpose of carrying on a certain business,¹⁰⁷ or had brought about an exchange of farms by representing that the interest on a certain mortgage would be paid,¹⁰⁸ an action based on an alleged tort cannot be maintained.¹⁰⁹

The importance of selecting the proper form of action cannot be underestimated. True, the tendency is now as strongly toward liberality in construing pleadings as it was formerly the reverse; but misconception by the pleader of the particular right, whether *ex delicto* or *ex contractu*, on which an action is based, may prove fatal.¹¹⁰ If an action is plainly brought on one theory, the plaintiff cannot, merely by proving a state of facts showing injury had he brought it on the other, be permitted to recover.¹¹¹ But, if a cause of action essentially on contract is properly set forth, the courts will be liberal in holding that mere allegations of bad faith, fraud, or negligence are not sufficient to convert it into an action in tort,¹¹² and in New York it is well established that if *facts* are set forth in a complaint which constitute a cause of ac-

¹⁰⁷ *Smith v. Parker*, 148 Ill. 127, 45 N. E. 770.

¹⁰⁸ *Alletson v. Powers*, 72 Vt. 417, 48 Atl. 647.

¹⁰⁹ And see, further, as illustrating the principle stated, *Dawe v. Morris*, 149 Mass. 188, 21 N. E. 313, 4 L. R. A. 158, 14 Am. St. Rep. 404; *Henry W. Boettger Silk Finishing Co. v. Electrical Audit & Rebate Co.* (Sup.) 115 N. Y. Supp. 1102; *Grove v. Hodges*, 55 Pa. 504.

¹¹⁰ The New York Code of Civil Procedure although it abolishes forms of pleading previously existing, did not change the distinction between actions in tort and those on contract. *Barnes v. Quigley*, 59 N. Y. 265; *Austin v. Rawdon*, 44 N. Y. 63.

¹¹¹ *Manker v. Western Union Tel. Co.*, 137 Ala. 292, 34 South. 839; *Neudecker v. Kohlberg*, 81 N. Y. 297; *Degraw v. Elmore*, 50 N. Y. 1; *Postal v. Cohn*, 83 App. Div. 27, 81 N. Y. Supp. 1089, holding that where an action was brought for fraud in falsely warranting the soundness of a horse, recovery could not be had on contract, plaintiff having failed to prove defendant's knowledge of the falsity of the representation at the time it was made; *Katzenstein v. Raleigh & G. R. Co.*, 84 N. C. 688; *Osborn v. First Nat. Bank of Athens*, 154 Pa. 134, 26 Atl. 289; *Welker v. Metcalf*, 209 Pa. 373, 58 Atl. 687; *Francisco v. Hatch*, 117 Wis. 242, 93 N. W. 1118.

¹¹² *Garcelon v. Commercial Travelers' Eastern Acc. Ass'n*, 184 Mass. 8, 67 N. E. 868, 100 Am. St. Rep. 540; *Critten v. Chemical Nat.*

tion on either theory, *and there is nothing in the complaint to show whether the plaintiff sues in tort or on contract*, he will be permitted to recover such a judgment as is warranted by the facts proved.¹¹³

STATUTORY TORTS

11. Though the majority of torts have a common-law origin, many are purely statutory. The duty may have been created by legislative act, and for its violation a liability will arise to an individual for whose protection it was imposed, where damage of the character which the statute was designed to prevent has proximately resulted.

With the advance of civilization, legislation becomes necessary to safeguard the rights of the individual against new dangers,¹¹⁴ or to supply the deficiencies of the common law by creating entirely new rights. Thus, until the passage of Lord Campbell's Act in England in 1846, no right of a personal representative or next of kin was considered to be violated by the negligent or willful killing of a human being, however great might be the resulting damage.¹¹⁵ Valuable kinds of property and privileges, like patents and copyrights, with their corresponding rights and duties, are matters of

Bank, 171 N. Y. 219, 63 N. E. 969, 57 L. R. A. 529; *Ledwich v. McKim*, 53 N. Y. 307; *Jones v. Leopold*, 95 App. Div. 404, 88 N. Y. Supp. 568; *Van Oss v. Synon*, 85 Wis. 661, 56 N. W. 190.

¹¹³ *Bradbury's Rules of Pleading*, p. 3; *Conaughty v. Nichols*, 42 N. Y. 83. In Georgia it has been held that if the allegations are equivocal the action will be deemed in tort. *Central of Georgia R. Co. v. Chicago Portrait Co.*, 122 Ga. 11, 49 S. E. 727, 106 Am. St. Rep. 87.

¹¹⁴ As by requiring the erection of fire escapes on apartment houses, *WILLY v. MULLEDY*, 78 N. Y. 310, 34 Am. Rep. 536, *Chapin Cas. Torts*, 10; or factories, *Pauley v. Steam Gauge & Lantern Co.*, 131 N. Y. 90, 29 N. E. 999, 15 L. R. A. 194.

¹¹⁵ *Carey v. Berkshire R. Co.*, 1 Cush. (Mass.) 475, 48 Am. Dec. 616; *The Harrisburgh*, 119 U. S. 199, 7 Sup. Ct. 140, 30 L. Ed. 358. It is believed that this statute has been adopted in every state, though necessarily with some modifications.

statutory creation, "liquor laws" in many states permit one who is injured by an intoxicated person to bring an action against the seller under certain conditions,¹¹⁶ and in one state at least the so-called "right of privacy," which protects an individual against the unauthorized use of his name or picture for advertising purposes, owes its origin to specific legislation.¹¹⁷

Public or Private Duties

Statutes of this character may assume such diverse forms that anything like a clear statement of underlying principles becomes well-nigh hopeless. There can, of course, be no doubt where the act specifically gives a cause of action to the individual aggrieved. But all legislation is not so clear, and many difficult questions have arisen in consequence. A new crime is created. Hitherto the commission of the act has resulted in *damnum absque injuria*. Will the creation of a penal liability, apparently to the state alone, give rise to a civil right? Thus the Legislature passes an act prohibiting the operation of unlicensed ferries under a penalty of \$5. A licensed ferryman sues in tort one who has no license, on the theory that the wrongful acts of the latter had disturbed the enjoyment of plaintiff's right. But plaintiff having at the common law no right to the exclusive enjoyment of his ferry, and the statute having undertaken to state just what the remedy should be, he could recover only the specific penalty imposed.¹¹⁸

Again, where an act requires a certain waterworks company to keep its pipes charged with water at a given pressure under a penalty of £10., half of which is to go to the informer, there can be no cause of action in favor of one whose buildings are destroyed by fire owing it is alleged, to the lack of

¹¹⁶ *McMahon v. Sankey*, 133 Ill. 636, 24 N. E. 1027; *Ward v. Thompson*, 48 Iowa, 588; *Gardner v. Day*, 95 Me. 558, 50 Atl. 892; *George v. Gobey*, 128 Mass. 289, 35 Am. Rep. 376; *Lucker v. Liske*, 111 Mich. 683, 70 N. W. 421; *Quinlan v. Welch*, 141 N. Y. 158, 36 N. E. 12; *Siblla v. Bahney*, 34 Ohio St. 399; *Davies v. McKnight*, 146 Pa. 610, 23 Atl. 320.

¹¹⁷ Consol. Laws N. Y. 1909, c. 6, art. 5, §§ 50, 51; and see *infra*, p. 288.

¹¹⁸ *Almy v. Harris*, 5 Johns. (N. Y.) 175.

pressure.¹¹⁹ Nor can one who is drafted into military service as an alternate recover against one drafted into the first class, who flies the country, in consequence of which the alternate is forced to serve.¹²⁰

On the other hand, where defendant suspended a sign across a street in violation of a public ordinance, by means of a wire rope fastened to an iron bolt in his building, and the bolt fell, breaking plaintiff's window, it was held that the latter might recover.¹²¹

The test to be applied is indicated by Brett, L. J., in the *Atkinson Case*, already cited, when he observes that "on the true construction of this statute it is plainly the intention of the Legislature that the only remedy for such a breach of duty as the present should be the recovery of the penalty." In other words, did the Legislature intend to stop short at making the act a public offense? If it did, then a public prosecution, whether it assume the form of an action instituted by the state or at the instance of the informer, can be the only result of the violation. Applying this rule, the decisions in the four cases quoted appear eminently logical.¹²²

¹¹⁹ *Atkinson v. Newcastle Waterworks Co.*, 2 Ex. D. 441.

¹²⁰ *Dennis v. Larkin*, 19 Iowa, 434. And see *Mack v. Wright*, 180 Pa. 472, 36 Atl. 913; *Utley v. Hill*, 155 Mo. 232, 55 S. W. 1091, 49 L. R. A. 323, 78 Am. St. Rep. 569.

¹²¹ *Salisbury v. Herchenroder*, 106 Mass. 458, 8 Am. Rep. 354. It made no difference that defendant was not negligent in hanging the sign or in maintaining it, since the act was inherently unlawful. And see *Klatt v. N. C. Foster Lumber Co.*, 97 Wis. 641, 73 N. W. 563. In some states, however, the violation of an ordinance is merely some evidence on the question of negligence to be submitted to the jury. *Knupfle v. Knickerbocker Ice Co.*, 84 N. Y. 488. And see *infra*, p. 534. The statute of Westminster II (13 Edw. I, c. 50) expressly gave a remedy by an action on the case to all who are aggrieved by the neglect of any duty created by any statute. 2 Inst. 486. In Virginia it has been enacted that "any person injured by the violation of any statute may recover from the offender such damage as he may sustain by reason of the violation, although a penalty or forfeiture for such violation be thereby imposed, unless the same be expressly mentioned to be in lieu of all damages." *Norfolk & West R. Co. v. Irvine*, 84 Va. 553, 5 S. E. 532.

¹²² See, further, *Harrod v. Latham Mercantile & Commercial Co.*, 77 Kan. 466, 95 Pac. 11; *Groves v. Winborne*, [1892] 2 Q. B. 402, 67 L. J. Q. B. 862, 79 L. T. Rep. (N. S.) 284; *Mairs v. Baltimore & O. R. Co.*, 73 App. Div. 265, 76 N. Y. Supp. 838.

A close case was where a seaman sued, alleging injury because of the violation of an act requiring shipowners to keep medicine on board. Though the decision went in plaintiff's favor, considerable doubt was subsequently expressed of its correctness.¹²³

Duty to Party Injured

Now, conceding that the act may be so drawn that it imposes a duty in favor of some one, the next question is whether it imposes a duty in favor of the particular individual by whom the suit is brought; for it is not sufficient that the duty has been created, nor even that the breach thereof should constitute actionable negligence so far as some members of the community are concerned. It must appear in addition that the plaintiff is one of a class of persons for whose benefit the Legislature passed the statute. For instance, a statute requiring fire escapes to be maintained on apartment houses is evidently for the benefit of tenants.¹²⁴ An act obliging railroad companies to blow whistles and ring bells at crossings,¹²⁵ or to maintain a flagman¹²⁶ or a signboard¹²⁷ there, is for the benefit of one crossing the road, while failure to provide statutory safeguards for dangerous machinery will give a cause of action to employes injured thereby.¹²⁸ For other cases reference is made to the note.¹²⁹

¹²³ *Couch v. Steel*, 3 El. & Bl. 402. But see *Atkinson v. Newcastle Waterworks Co.*, 2 Ex. D. 441.

¹²⁴ *WILLY v. MULLEDY*, 78 N. Y. 310, 34 Am. Rep. 536, Chapin Cas. Torts, 10.

¹²⁵ *Richardson v. New York Cent. R. Co.*, 45 N. Y. 846; *Ernst v. Hudson River R. Co.*, 35 N. Y. 9, 90 Am. Dec. 761; *Chicago & E. I. R. Co. v. Boggs*, 101 Ind. 522, 51 Am. Rep. 761. Liability is not restricted to cases of collision. *Norton v. Eastern R. Co.*, 113 Mass. 366, holding that a recovery might be had, where a warning was not given, for injury to a horse driven by plaintiff, which was frightened by the sudden approach of the cars and broke its leg. *Green v. Eastern R. Co. of Minnesota*, 52 Minn. 79, 53 N. W. 808, where plaintiff's horse, having been frightened, jumped and whirled around, throwing plaintiff.

¹²⁶ *Johnson v. St. Paul & D. R. Co.*, 31 Minn. 283, 17 N. W. 622.

¹²⁷ *Dodge v. Burlington, C. R. & N. R. R. Co.*, 34 Iowa, 276.

¹²⁸ *Davis v. Mercer Lumber Co.*, 164 Ind. 413, 73 N. E. 899; *Ashman v. Flint & P. M. R. Co.*, 90 Mich. 567, 51 N. W. 645; *Klein v.*

¹²⁹ See note 129 on following page.

On the other hand, a statute which required that all engaged in blasting should give seasonable notice of each explosion, so that "all persons or teams that may be approaching shall have a reasonable time to retire to a safe distance," will not give a cause of action to a workman injured by the failure of a fellow quarryman to give such notice.¹⁸⁰ Nor is the advertising of letters unclaimed at the post office deemed to be for the benefit of the newspapers wherein such advertisements appear.¹⁸¹

An act requiring railroads to block "frogs" in their yards is designed for the protection of those rightfully upon the

Garvey, 94 App. Div. 183, 87 N. Y. Supp. 998; Klatt v. N. C. Foster Lumber Co., 97 Wis. 641, 73 N. W. 563; Groves v. Winborne, [1898] 2 Q. B. 402, 67 L. J. Q. B. 862, 74 L. T. Rep. N. S. 284.

¹²⁹ Burk v. Creamery Package Mfg. Co., 126 Iowa, 730, 102 N. W. 793, 106 Am. St. Rep. 377; Billings v. Breinig, 45 Mich. 65, 7 N. W. 722; Keyser v. Chicago & G. T. Ry. Co., 66 Mich. 390, 33 N. W. 867; Kinney v. Koopman, 116 Ala. 310, 22 South. 593, 37 L. R. A. 497, 67 Am. St. Rep. 119, note; Channon Co. v. Hahn, 189 Ill. 28, 59 N. E. 522; Brown v. Wittner, 43 App. Div. 135, 59 N. Y. Supp. 385; McRickard v. Flint, 114 N. Y. 222, 21 N. E. 153.

¹³⁰ "Persons that may be approaching' seem rather intended to apply to those only who are not engaged in or around the quarry, and who, therefore, being ignorant of their proximity to danger, are seen coming within the danger line, instead of including with them such persons also as are constantly engaged there, and have personal knowledge of what is taking place there." Hare v. McIntire, 82 Me. 240, 19 Atl. 453, 8 L. R. A. 450, 17 Am. St. Rep. 476.

¹³¹ STRONG v. CAMPBELL, 11 Barb. (N. Y.) 135, Chapin Cas. Torts, 13. Action by proprietors of a newspaper, alleged to have the largest circulation in Rochester, against the postmaster of that city, based on the latter's refusal to advertise unclaimed letters as required by an act of Congress. The statute, it was held, was not passed "that publishers of newspapers might be enabled to obtain profitable employment and receive emoluments from the public treasury. That was no part of the design of the lawmakers. The design of the law obviously was, first, to benefit persons receiving communications through the post office, by giving the widest possible notice that letters remained on hand ready for delivery, and secondly, to secure the greatest amount of revenue to the department by the delivery of letters and the receipt of postage thereon, which might otherwise never be called for and consequently be returned to the dead letter office."

premises, and not of trespassers;¹³² and a city ordinance that in every factory elevators, "when so located as to endanger the lives and limbs of those employed therein while in discharge of their duties, shall be so far as practicable so covered or guarded as to insure against any injury to such employés," cannot, when disobeyed, form the basis of an action by a member of the fire patrol, who enters such building in the discharge of his duties, since he is not an "employé."¹³³ Again an act making it obligatory for railroads to fence against live stock "running at large," which contains a further provision that the operating of trains on depot grounds, where no such fence is built, at a greater rate of speed than eight miles per hour, shall be deemed negligence, creates no cause of action in favor of the owner of a horse killed at the depot while harnessed to a wagon, since such horse was not "running at large."¹³⁴

Not only must the statute create a duty to the very class of persons to which plaintiff belongs, but the loss which plaintiff suffers must be of the kind which the statute was designed to prevent. Hence, where a statute enacted for the purpose of guarding against the spread of contagious diseases among animals carried into England required the construction of pens on vessels, it was held that a shipper could recover no damages for sheep washed overboard, although the sheep would not have been lost had the pens been built.¹³⁵

Creation of Remedy

If, upon construing the statute, it is found that its violation gives a cause of action to the particular party who may have suffered loss, it then becomes necessary to note whether

¹³² *Akers v. Chicago, St. P., M. & O. Ry. Co.*, 58 Minn. 540, 60 N. W. 669.

¹³³ *Gibson v. Leonard*, 143 Ill. 182, 32 N. E. 182, 17 L. R. A. 588, 36 Am. St. Rep. 376.

¹³⁴ *Cohoon v. Chicago, B. & Q. R. Co.*, 90 Iowa, 169, 57 N. W. 727. For further illustrations, see *Mobile Life Ins. Co. v. Brame*, 95 U. S. 754, 24 L. Ed. 580; *Carper v. Receivers of Norfolk & W. R. Co.*, 78 Fed. 94, 23 C. C. A. 669, 35 L. R. A. 135; *Wright v. Southern Ry. Co.* (C. C.) 80 Fed. 260; *Kansas City, Ft. S. & M. R. Co. v. Kirksey*, 60 Fed. 999, 9 C. C. A. 321; *People v. Linck*, 71 Ill. App. 358.

¹³⁵ *Gorris v. Scott*, L. R. 9 Exch. 125.

the Legislature has provided a specific remedy, which can alone be followed.

It is important at this stage to differentiate, on the one hand, between cases where the right created is entirely new, and is not one already recognized by the common law, and, on the other, where the right, although recognized by the statute, was not created by it. In the former instance (i. e., where the right created is entirely new), if the statute provides for the method of redress, the injured party is to be regarded as confined thereto. For instance, at common law, property may be destroyed to prevent the spread of fire, and no compensation was allowed. Where the statute gives a right to compensation, and prescribes how it shall be collected, that method must be pursued.¹³⁶

A further example illustrative of this principle is found in the case of patents. As we have already seen, the patent right is purely statutory, and as jurisdiction of suits for infringement is vested solely in the United States courts, state tribunals have no authority to entertain them.¹³⁷ Where a municipality is made liable under circumstances where it would not be responsible at common law, providing that preliminary notice is served, such notice is essential to the maintenance of an action against it.¹³⁸ Statutes giving a cause of action for death due to wrongful act or neglect can be brought only by ¹³⁹ and for the benefit of persons to whom the cause of action is given,¹⁴⁰ and only to the extent ¹⁴¹ and within the time specified.¹⁴²

¹³⁶ Russell v. Mayor, etc., of City of New York, 2 Denio (N. Y.) 461.

¹³⁷ Dudley v. Mahew, 3 N. Y. 9; Continental Store Service Co. v. Clark, 100 N. Y. 370, 3 N. E. 335; Waterman v. Shipman, 130 N. Y. 301, 308, 29 N. E. 111.

¹³⁸ Sachs v. City of Sioux City, 109 Iowa, 224, 80 N. W. 336.

¹³⁹ Schmidt v. Menasha Woodenware Co., 99 Wis. 300, 74 N. W. 797.

¹⁴⁰ Western Union Tel. Co. v. McGill, 57 Fed. 699, 6 C. C. A. 521, 21 L. R. A. 818.

¹⁴¹ Ohnmacht v. Mt. Morris Electric Light Co., 66 App. Div. 482, 73 N. Y. Supp. 296.

¹⁴² Staeffler v. Menasha Woodenware Co., 111 Wis. 483, 87 N. W. 480; County v. Pacific Coast Borax Co., 68 N. J. Law, 273, 53 Atl. 386.

The principle will be found further illustrated in cases cited in the note.¹⁴³

If, however, a statute creates a wholly new right, but provides no method of enforcing it, the general rule applies that the law will not permit a right to fail for want of a remedy, or, as the maxim has it, "*ubi jus ibi remedium.*" Thus, although the statute requiring fire escapes on apartment houses, to which we have already referred, failed to provide for any specific action to be brought by the injured party, nevertheless a tenant was permitted to recover damages for the death of his wife by a fire which destroyed the building, where it appeared that, if the fire escape had been constructed, the deceased could and probably would have escaped.¹⁴⁴ The same principle applies to actions brought by employes injured by a violation of the act requiring the employer to provide specific safeguards not hitherto required,¹⁴⁵ as well as to actions brought by the owners of property taken by municipal corporations, where a constitutional provision requires payment to be made, but provides for no specific remedy.¹⁴⁶

Then there may be cases where the statute has merely given an additional remedy for a common-law right, and here we may have to determine whether the remedy was designed to be cumulative, or was to supersede that already in existence. In general, it is deemed cumulative. Thus the fact that a statute gives the right to distrain and sell cattle damage feasant will not take away the common-law remedy of an action

¹⁴³ *Smith v. Drew*, 5 Mass. 514; *McKinney v. Monongahela Nav. Co.*, 14 Pa. 65, 53 Am. Dec. 517; *French v. Willer*, 126 Ill. 611, 18 N. E. 811, 24 L. R. A. 717, 9 Am. St. Rep. 651; *Hodges v. Tama County*, 91 Iowa, 578, 60 N. W. 185; *City of Rochester v. Campbell*, 123 N. Y. 405, 25 N. E. 937, 10 L. R. A. 393, 20 Am. St. Rep. 760; *Jessup v. Carnegie*, 80 N. Y. 441, 36 Am. Rep. 643; *Commissioners of Hancock County v. Bank of Findley*, 32 Ohio St. 194; *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747, 7 Sup. Ct. 757, 30 L. Ed. 825.

¹⁴⁴ *WILLY v. MULLEDY*, 78 N. Y. 310, 34 Am. Rep. 536, Chaplin Cas. Torts, 10.

¹⁴⁵ *Wolf v. Smith*, 149 Ala. 457, 42 South. 824, 9 L. R. A. (N. S.) 338.

¹⁴⁶ *Chester County v. Brower*, 117 Pa. 647, 12 Atl. 577, 2 Am. St. Rep. 713; *Householder v. Kansas City*, 83 Mo. 488.

for trespass.¹⁴⁷ A statutory proceeding for the location of lost corners and disputed boundaries will not do away with an action of ejectment;¹⁴⁸ and the fact that a railroad is made liable, without proof of negligence, under an act requiring it to fence its right of way, will not prevent the owner of a cow killed by a locomotive from bringing a common-law action to recover the value, where the killing was negligent.¹⁴⁹ So the "Employer's Liability Acts," which impose additional obligations on the master, did not take away a cause of action for the violation of a duty which existed prior to their passage. The servant has his election.¹⁵⁰

In a restricted class of cases, however, although a right has previously existed, it may be inferred that the Legislature intended that the remedy provided should be regarded as exclusive and as superseding the previous method of redress.¹⁵¹

METHOD OF VIOLATION

12. Though a tort is usually the result of an act, it may consist as well in the omission to perform a duty imposed by law.

Act or Omission

It has been well stated that a tort may arise because "of nonfeasance, * * * the omission of an act which a per-

¹⁴⁷ *Colden v. Eldred*, 15 Johns. (N. Y.) 220; *Stafford v. Ingersol*, 3 Hill (N. Y.) 38, where it was said: "Where a statute merely gives a new remedy without any negative, expressed or implied, the old remedy is not taken away, and a party may have his election between the two." And see *Coxe v. Robbins*, 9 N. J. Law, 384; *Coffin v. Field*, 7 Cush. (Mass.) 355.

¹⁴⁸ *Keller v. Harrison*, 139 Iowa, 383, 116 N. W. 327.

¹⁴⁹ *Iba v. Hannibal & St. J. R. Co.*, 45 Mo. 469.

¹⁵⁰ *Ryalls v. Mechanics' Mills*, 150 Mass. 190, 22 N. E. 766, 5 L. R. A. 667; *Gmaehle v. Rosenberg*, 178 N. Y. 147, 70 N. E. 411. And see generally, as illustrating the principle referred to, *McKay v. Woodle*, 28 N. C. 352; *Cumberland & Oxford Canal Corp. v. Hitchings*, 59 Me. 206; *Bellant v. Brown*, 78 Mich. 294, 44 N. W. 326; *Lott v. Swezey*, 29 Barb. (N. Y.) 87; *Adams v. Richardson*, 43 N. H. 212.

¹⁵¹ *Young v. Kansas City, St. J. & C. B. Ry. Co.*, 33 Mo. App. 509; *Calking v. Baldwin*, 4 Wend. (N. Y.) 667, 21 Am. Dec. 168.

son ought to do; misfeasance, * * * the improper doing of an act which a person might lawfully do; and malfeasance, the doing of an act which a person ought not to do at all."¹⁵² Let us take as illustration the case of a railroad. An entry without authority of law upon my land for the purpose of laying rails will constitute malfeasance, since the act is inherently unlawful. The railroad may also injure me because its trains are run at an excessive rate of speed, and since the running of trains is inherently lawful and the tort arises here out of the method of performance, it will be a case of misfeasance. But the railroad as a common carrier is under a duty imposed by law to transport freight¹⁵³ and passengers,¹⁵⁴ and a refusal to do so without lawful excuse will constitute nonfeasance, for which a cause of action will lie. An analagous common-law duty rests upon the innkeeper, who is bound to receive and entertain travelers who are able to pay for their accommodation, provided that he has the facilities at his disposal.¹⁵⁵ In these and other instances¹⁵⁶ the law departs from its usual formula of "Thou shalt not," and declares, "Thou shalt."

A striking illustration is the tort negligence. As will be seen hereafter, this is in reality a failure to observe the degree of care which a reasonable man would have observed under the circumstances of the particular case, by reason of which injury is proximately caused to one to whom a duty to exercise care was owing.¹⁵⁷ It is thus diametrically opposed to will-

¹⁵² *Bell v. Josselyn*, 3 Gray (Mass.) 309, 311, 63 Am. Dec. 741.

¹⁵³ *Chicago & A. R. Co. v. Suffern*, 129 Ill. 274, 21 N. E. 824.

¹⁵⁴ *Nevin v. Pullman Palace Car Co.*, 106 Ill. 222, 46 Am. Rep. 688.

¹⁵⁵ *Watson v. Cross*, 2 Duv. (Ky.) 147; *Cornell v. Huber*, 102 App. Div. 293, 92 N. Y. Supp. 434.

¹⁵⁶ A railroad company is liable to a passenger for injuries due to the failure to heat its waiting room, *St. Louis, I. M. & S. Ry. Co. v. Wilson*, 70 Ark. 136, 66 S. W. 661, 91 Am. St. Rep. 74; and for the failure to exercise due care to protect a passenger from a drunken fellow passenger, *United Rys. & Electric Co. of Baltimore v. State, to Use of Deane*, 93 Md. 619, 49 Atl. 923, 54 L. R. A. 942, 86 Am. St. Rep. 453.

¹⁵⁷ See *Bucki v. Cone*, 25 Fla. 1, 6 South. 160. And see *infra*, p. 499.

fulness or wantonness, since the latter terms presuppose intent and deliberation existing in the mind of the wrongdoer—a distinction of considerable importance, as different rules govern the defenses which may be interposed and the damages which may be assessed.

METHOD OF REDRESS

13. To constitute a tort, the act or omission must give rise to a common-law action for damages. But if the wrong may be redressed thereby, it will be none the less a tort, though courts of equity or of admiralty have concurrent jurisdiction, or redress by act of the injured party may be permitted.

Concurrent Jurisdiction in Equity and Admiralty

It has been said that the word “torts” in legal phraseology does not include all wrongs for which redress is given, even though the right invaded has not been created by contract, since “no civil injury is to be classed as a tort, unless the appropriate remedy for it is an action for damages. Such an action is an essential characteristic of every true tort.”¹⁵⁸

But it must not be concluded from this that an action for damages is the sole remedy which must be sought when a tort has been committed, for in many instances the plaintiff may have an election. At common law the owner of chattels unlawfully withheld may recover them in actions of detinue or replevin, though he may also recover their value in an action of trover based on the conversion,¹⁵⁹ and a court of equity will afford relief by injunction in many instances where property rights are threatened and money damages would be inadequate, as in cases of trespass where irreparable damage is threatened.¹⁶⁰ So, too, the equitable remedy of injunction, discovery, and accounting will lie in cases of unfair competition.¹⁶¹ Although damages may be recovered in cases of nuisance, a court

¹⁵⁸ Salmond on Torts, p. 2.

¹⁵⁹ See *infra*, p. 370.

¹⁶⁰ See *infra*, p. 358.

¹⁶¹ See *Regis v. Jaynes & Co.*, 191 Mass. 245, 77 N. E. 774; *Leather*

of equity may order an abatement as additional relief,¹⁶² and contracts procured by fraud may be canceled or reformed.¹⁶³

In all these cases the money damages which could alone be given in a common-law action are clearly inadequate, although "it is solely by virtue of the right to damages that the wrong complained of is to be classed as a tort."¹⁶⁴

Furthermore, in many instances equity will interfere where there would be no recovery at the common law. Thus a landowner has a right to the lateral support of his premises in their natural state. Suppose his neighbor commences to dig on adjoining lands, taking no precautions to avoid an inevitable landslide, which will work serious injury. Up to this point there has been no tort, since no damage has been suffered for which the law will give redress. The land must first fall. Equity, however, will step in and enjoin the threatened wrong.¹⁶⁵

It may be, too, that a given combination of circumstances will furnish a cause of action to be redressed either in the courts of common law or in the courts of admiralty. The latter have jurisdiction over wrongs committed on the high seas or public navigable waters. Maritime torts are therefore of the same nature as common-law torts, with the element of locality added.¹⁶⁶

To confer jurisdiction on an admiralty court, the tort must be consummated upon the water. Thus, the common-law courts, it was held, could alone take cognizance where a vessel

Cloth Co. v. Hirshfeld, 1 Hem. & M. 295, 1 New Rep. 551, 11 Wkly. Rep. 933, 71 Eng. Repr. 129.

¹⁶² See *Carlisle v. Cooper*, 18 N. J. Eq. 241; and see *infra*, p. 574.

¹⁶³ See *infra*, p. 394.

¹⁶⁴ Salmond on Torts, p. 2.

¹⁶⁵ *Trowbridge v. True*, 52 Conn. 190, 52 Am. Rep. 579; *Farrand v. Marshall*, 21 Barb. (N. Y.) 409; *Finegan v. Eckerson*, 32 App. Div. 233, 52 N. Y. Supp. 993. An injunction will issue in equity to prevent the threatened obstruction of a right of way. *Smith v. People*, 142 Ill. 117, 31 N. E. 599.

¹⁶⁶ *In re Fassett*, 142 U. S. 479, 12 Sup. Ct. 295, 35 L. Ed. 1087; *Philadelphia, W. & B. R. Co. v. Philadelphia H. De G. Steam Towboat Co.*, 23 How. 209, 16 L. Ed. 433; *The Genessee Chief v. Fitzhugh*, 12 How. 443, 13 L. Ed. 1058; *Greenwood v. Town of Westport* (D. C.) 53 Fed. 824.

lying at a wharf caught fire by the negligence of those in charge and the flames spread to plaintiff's storehouse on the wharf,¹⁶⁷ where a vessel's boom struck a warehouse on the wharf,¹⁶⁸ and where a workman was injured by the slipping of a ladder which rested on the wharf and extended up the ship's side.¹⁶⁹

Admiralty courts do not, however, always follow common-law principles. For instance, in admiralty the contributory negligence of the plaintiff may not prevent his recovery, where negligence has existed on the part of the defendant, although at common law it will constitute a bar.¹⁷⁰ The procedure also may differ; for, whereas a tort is redressed at common law only by a proceeding against the individual wrongdoer, in personam, admiralty will in some cases permit a choice between an action in personam and a proceeding in rem. In the latter "the thing itself against which the right is claimed or liability asserted is proceeded against by name, irrespective of its ownership, arrested or taken into legal custody, and finally sold to answer the demand, unless its owner appears and bonds it."¹⁷¹ Thus, in case of collision, the injured party may proceed in rem directly against the ship alone, or against the master or owner alone in personam, or against the ship in rem and the master in personam,¹⁷² while for an assault or beating the suit is in personam only.¹⁷³

Self-Redress

Again, the injured party is sometimes permitted by the policy of the law to redress his own wrongs, as where property is unlawfully taken from him and he forcibly regains possession forthwith,¹⁷⁴ or where he abates a nuisance.¹⁷⁵

¹⁶⁷ *The Plymouth*, 8 Wall. 20, 18 L. Ed. 125.

¹⁶⁸ *Johnson v. Chicago & P. Elevator Co.*, 119 U. S. 388, 7 Sup. Ct. 254, 30 L. Ed. 447.

¹⁶⁹ *The H. S. Pickands* (D. C.) 42 Fed. 239. And see *Gordon v. Drake* (Mich. 1916) 159 N. W. 340.

¹⁷⁰ *THE MAX MORRIS*, 137 U. S. 1, 11 Sup. Ct. 29, 34 L. Ed. 586, Chapin Cas. Torts, 350. And see *infra*, p. 542.

¹⁷¹ *Hughes on Admiralty Law*, p. 354.

¹⁷² *Admiralty Rules of Practice*, No. 15. And see *The Corsair*, 145 U. S. 335, 12 Sup. Ct. 949, 36 L. Ed. 727.

¹⁷³ *Admiralty Rules of Practice*, No. 16.

¹⁷⁴ See *infra*, p. 265.

¹⁷⁵ See *infra*, p. 571.

ACTIONS OF TRESPASS AND CASE

14. At common law injuries which constituted a direct and forcible invasion of personal or property rights were redressed in an action of trespass. Under other circumstances the Statute of Westminster II permitted an action to be brought on the case.

Trespass and Case

At common law an action was begun by the issuance of an "original writ" (*breve originale*), the ancient forms of which, called "*brevia formata*," are found in the *Registrum Brevium*, or register of writs. Three forms of action were recognized—real, mixed, and personal; the first for the recovery of real property only, the second for the recovery of real property with damages for any injury thereto, as ejectment, and the third for recovery of a debt or a chattel or to obtain damages either for breach of contract or for injury to the person or property. These personal actions were necessarily in form *ex contractu* or *ex delicto*. Of the personal actions brought to obtain damages for injuries to the person or to property, among the earliest was trespass. This was restricted to cases where there was a direct, forcible, and immediate invasion of another's right. For instance, in assault and battery or false imprisonment, the particular form was *trespass vi et armis*, where the wrong consisted in an unlawful entry upon the real property of another it was *trespass quare clausum fregit*, and where personal property was carried away it was *trespass de bonis asportatis*.

As new causes of action arose, though the wrong was conceded to exist, the injured party found himself without remedy, since he might find no writ in the *Registrum Brevium* to fit his case. This continued until the Statute of Westminster II (13 Edw. I, c. 24), which provided that as often as it shall happen that in one case a writ is found and in a like case (*in consimili casu*) falling under the same right and requiring like remedy no writ is to be found, the clerks of the chancery shall agree in making a writ or adjourn the complaint and

refer the matter to the next Parliament.¹⁷⁶ From this arose the celebrated writs of "trespass on the case" (*brevia de transgressione super casum*), so called, as founded on the peculiar circumstances involved which required a remedy. Now the distinction between the old trespass and the new trespass on the case, or as it was usually called "case," was well defined. To maintain the first form of action the injury must have resulted directly from the forcible act of the defendant; for, if the injury was consequential only, the remedy was in case.¹⁷⁷ This has been well illustrated by supposing that a log is cast into the highway. If, while in motion, it hits a traveler, the injury is immediate, and trespass lies; but if, after it reaches the highway and becomes stationary, a traveler falls over it and is hurt, the injury is consequential, and the remedy is case.¹⁷⁸ Hence an action for damages received from an animal kept by the defendant and known by him to be ferocious¹⁷⁹ is in case, since the wrong here is in the keeping of the beast; though if the defendant sets the animal on it will be trespass.¹⁸⁰ False imprisonment, as we have seen, is in trespass; but malicious prosecution is in case.¹⁸¹

Perhaps the largest class where case lies embraces actions founded on the failure to do an act, or to exercise proper care in doing it.¹⁸²

Anything like a full discussion of these forms of action is, of course, impossible within the compass of a work which does not attempt to treat of common-law pleading. At common law, if the pleader mistook his remedy, his action would be dismissed. The arbitrary distinction between trespass and

¹⁷⁶ Shipman on Common Law Pleading, p. 4.

¹⁷⁷ Scott v. Shepherd, 2 Wm. Bl. 892; Covell v. Laming, 1 Camp. 497.

¹⁷⁸ Painter v. Baker, 16 Ill. 103, 104.

¹⁷⁹ Stumps v. Kelley, 22 Ill. 140.

¹⁸⁰ Painter v. Baker, 16 Ill. 103, 104.

¹⁸¹ Luddington v. Peck, 2 Conn. 700; Hamilton v. Smith, 39 Mich. 222; Beaty v. Perkins, 6 Wend. (N. Y.) 382; Kennedy v. Barnett, 64 Pa. 141.

¹⁸² Coggs v. Bernard, 2 Ld. Raymond, 909; Cate v. Cate, 50 N. H. 144, 9 Am. Rep. 179; Dearborn v. Dearborn, 15 Mass. 316; Hamilton v. Plainwell Water Power Co., 81 Mich. 21, 45 N. W. 648.

case has generally been abolished, though the words still survive in current legal language.

15. HISTORY AND BIBLIOGRAPHY

History

Considered as a whole, the law of torts presents startling anomalies. It is at once the most ancient and one of the most modern branches of jurisprudence. As Sir Henry Maine has pointed out, the conception of compensation to the individual far antedates that of an injury to the community.¹⁸³ Even murder was subject to this rule.¹⁸⁴ In the more primitive stages of racial development, force and violence constituted the chief wrongs, and in consequence the rules governing such

¹⁸³ "The penal law of ancient communities is not the law of crimes; it is the law of wrongs, or, to use the English technical word, of 'torts.' The person injured proceeds against the wrongdoer by an ordinary civil action, and recovers compensation in the shape of money damages, if he succeeds. If the Commentaries of Gaius be opened at the place where the writer treats of penal jurisprudence founded on the Twelve Tables, it will be seen that at the head of the civil wrongs recognized by the Roman law stood *furtum*, or theft. Offenses which we are accustomed to regard exclusively as crimes are exclusively treated as *torts*, and not theft only; but assault and violent robbery are associated by the jurisconsult with trespass, libel, and slander. All alike give rise to an obligation, or *vinculum juris*, and were all requited by a payment of money. This peculiarity, however, is most strongly brought out in the consolidated laws of the Germanic tribes. Without an exception they describe an immense system of money compensation for homicide, and with few exceptions as large a scheme of compensation for minor injuries. * * * If, therefore, the criterion of a *delict*, *wrong*, or *tort* be that the person who suffers it, and not the state, is conceived to be wronged, it may be asserted that in the infancy of jurisprudence the citizen depends for protection against violence or fraud, not on the law of crime, but on the law of tort." "Ancient Law," by Sir Henry Maine, 358. A curious illustration is given by Gibbon ("Decline and Fall of the Roman Empire," c. 44), who tells how one Veratius found amusement in rushing through the streets and striking in the face inoffensive travelers, while his attendant purse bearer immediately silenced their claims by the legal tender of twenty-five pieces of copper, about the value of one shilling.

¹⁸⁴ The lack of primitive perception of the difference between criminal and civil wrongs is shown when we come to the weregeld. By

torts as assault, battery, false imprisonment, and trespass to lands and chattels are well fixed; and the same is true to a large extent of abuse of process, malicious prosecution, waste, nuisance, and defamation, although the recognition of these injuries must of necessity have dated from a later epoch. Though the principles governing fraud and negligence, torts of ancient origin, are well established, they are necessarily largely modern in their application, while the law of unfair competition, interference with contractual rights and with legal remedies, violation of the right of privacy, and conspiracy is yet in process of evolution.¹⁸⁵

To the difference between conditions prevailing in this country and in England must be attributed the changes which, without legislation, some of the common-law principles have undergone in America. In the more settled country it may be only fair to consider a window in existence for 20 years as "an ancient light," the owner of which may maintain an action in tort against one who blocks air, light and view, though the obstruction be erected wholly on the property of the builder. But such a doctrine cannot "be applied in the growing cities and villages of this country without working the most mischievous consequences,"¹⁸⁶ though in a few states

the law of ancient Greece, where a murder was done under the impulse of a sudden passion or insanity, the culprit was allowed to choose compensation. In the earlier periods the form such compensation took was that of servile labor for a term of years, generally eight. In later times this was superseded by a money payment. *Hist. Jur.*, by Guy Carleton Lee, 169. In England payment of the wergeld was regulated from time to time by royal ordinance, the most complete having been published by Edward the Elder (A. D. 901-924). At the head stood the king, with 30,000 thrilmsas, or £500. of the money of the period, half of which went to the king's kindred and half to the state; an archbishop or earl 15,000, or £250.; a bishop or alderman 8,000, or £133. 6s. 8d.; a priest or thane, 2,000, or £33. 6s. 8d.; a ceorl or common person, 267, or 9s. In a similar way a pecuniary fine of smaller amount would relieve a man of corporal punishment for various minor offenses. "The King's Peace," by F. A. Inderwick, Q. C., 26; Reeve, *Hist. Eng. L.* vol. 1, p. 28.

¹⁸⁵ See 38 Cyc. 417.

¹⁸⁶ Per Bronson, J., in *Parker v. Foote*, 19 Wend. (N. Y.) 309, 318. And see *Guest v. Reynolds*, 68 Ill. 478, 18 Am. Rep. 570; *Hayden v.*

statutes have been passed giving a cause of action where the structure was maliciously erected.¹⁸⁷

To cut down trees in England is waste, since it may well work a serious injury to the freehold, while in America it might be a valuable improvement.¹⁸⁸

Cases of Novel Impression

The maxim that "wherever there is a right there is a remedy," to which reference has already been made, has played an important part in the development of the tort theory. The common law, it has been said, is founded on precedent, and the fact that no precedent can be found for an action in tort based upon a particular act or omission will be considered by the court in determining whether an action will lie; ¹⁸⁹ but where a legal right is manifestly violated, the mere fact that the proceeding is novel will not of itself operate as a bar to redress. Such actions are said to be of "novel impression." ¹⁹⁰

Dutcher, 31 N. J. Eq. 217; *Letts v. Kessler*, 54 Ohio St. 73, 42 N. E. 765, 40 L. R. A. 177.

¹⁸⁷ *Rideout v. Knox*, 148 Mass. 368, 19 N. E. 390, 2 L. R. A. 81, 12 Am. St. Rep. 560; *Horan v. Byrnes*, 72 N. H. 93, 54 Atl. 945, 62 L. R. A. 602, 101 Am. St. Rep. 670; *Id.*, 72 N. H. 600, 58 Atl. 42.

¹⁸⁸ See *infra*, p. 390.

¹⁸⁹ *Rice v. Coolidge*, 121 Mass. 393, 23 Am. Rep. 279; *Ryan v. New York Cent. R. Co.*, 35 N. Y. 210, 91 Am. Dec. 49. In *Davis v. Minor*, 2 U. C. Q. B. 464, 468, where it was held that an action on the case in the nature of conspiracy would not lie against a person for supplanting another in the purchase of goods which had first been contracted for by the latter, the court said: "No doubt it is not decisive against this action lying that no precedent of precisely such an action can be found, when the principle upon which it is governed is not new; but if the question seems a doubtful one, and the occasions for such actions must very frequently have arisen, then the absence of any precedent is a strong argument against the action."

¹⁹⁰ *Woodbury v. Tampa Waterworks Co.*, 57 Fla. 243, 49 South. 556, 21 L. R. A. (N. S.) 1034; *Piper v. Hoard*, 107 N. Y. 73, 13 N. E. 626, 1 Am. St. Rep. 789; *Van Pelt v. McGraw*, 4 N. Y. 110; *Graham v. Wallace*, 50 App. Div. 101, 63 N. Y. Supp. 372; *Ring v. Ogden*, 45 Wis. 303; *Western Counties Manure Co. v. Lawes Chemical Manure Co.*, L. R. 9 Exch. 218, 43 L. J. Exch. 171, 23 Wkly. Rep. 5. Thus, where plaintiff was induced to marry by defendant's statement that the girl was virtuous, defendant knowing this to be false,

Bibliography

While, as we have seen, the principles applicable to many specific injuries are exceedingly ancient, the recognition of torts as a separate branch of the law, and not as a mere series of disconnected wrongs, each governed by its distinct code of rules, is comparatively recent. It was not until 1859 that a treatise appeared, the work of an American author, covering the law of torts as a whole.¹⁹¹ This was followed a year later by an English work,¹⁹² which in its eighth edition is still a standard.

Although preceded by both the works of Professor Bigelow and of Judge Cooley, and although five years earlier Mr. Justice Holmes in his "Common Law" had discussed the

judgment for plaintiff was affirmed. "While no precedent is cited for such an action," said the court, "it does not follow that there is no remedy for the wrong, because every form of action, when brought for the first time, must have been without a precedent to support it. Courts sometimes of necessity abandon their search for precedents and yet sustain a recovery upon legal principles clearly applicable to the new state of facts, although there was no direct precedent for it, because there never had been occasion to make one. The question, therefore, is not whether there is any precedent for the action, but whether defendant inflicted such a wrong upon plaintiff as resulted in lawful damages." *KUJEK v. GOLDMAN*, 150 N. Y. 176, 178, 44 N. E. 773, 774, 34 L. R. A. 156, 55 Am. St. Rep. 670, Chapin Cas. Torts, 16. So where defendant suborned witnesses to testify falsely to defamatory statements concerning plaintiff, neither plaintiff nor defendant being a party to the suit, it was held that "the fact that an action is without a precedent would call upon the court to consider with care the question whether it is justified by correct principles of law; but, if this is found, it is without weight." *Rice v. Coolidge*, 121 Mass. 393, 23 Am. Rep. 279.

¹⁹¹ Hilliard on Torts. The experience of Mr. Bishop as told in his *Non-Contract Law*, p. 2, shows how such a work was at first considered. "In 1853, after my *Marriage and Divorce* had appeared, and, urged by friends and publishers, I had determined to write more books, I proposed to publishers a book on the law of torts. Presenting the subject, first to one publishing house, and then to every other law publishing house in the United States, and explaining the nature of the subject and the need of a book upon it, I received from all the reply that there was no call for a work on that subject, and there could be no sale for it. 'If,' said one, voicing the undivided opinion, 'the book were written by the most eminent and prominent author that ever lived, not a dozen copies a year could be sold.'"

¹⁹² Addlson on Torts.

question whether there was any common ground at the bottom of all liability in tort, it is practically with the classic treatise of Sir Frederick Pollock that the development of the general law of tort begins. Writing in 1886, the author declared that his purpose was "to show that there is really a law of torts; not merely a number of rules about various kinds of torts; * * * that there is a true, living branch of the common law, and not a collection of heterogeneous instances." Several editions have appeared, both of "Bigelow on Torts" and "Cooley on Torts," and they are to-day recognized as leading authorities.

In 1885 Professor Jaggard's work was published, and was followed the next year by Mr. Hale's "Handbook on the Law of Torts." The former pursues in the main the plan of Sir Frederick Pollock, making the discussion of specific wrongs more an illustration and development of general principles, while the latter is practically an abridgment of Professor Jaggard's two-volume treatise. In 1905 Professor Burdick's work appeared, a third edition of which was published in 1913.

16. SCOPE OF THE PRESENT WORK

In discussing this subject we shall first consider certain general principles applicable to the entire range of tort actions, and in particular those determining liability for accidental injuries, responsibility as dependent upon condition of mind, and the existence of damage, liability under the legal rules which define cause and effect, certain defenses which, broadly speaking, may be interposed to all tort actions, and the right to recovery as determined by the locality where the tort was committed. We shall then take up the parties to a tort, under which head will be included actions against the single and the joint wrongdoer, and responsibility for individual acts as distinguished from responsibility for the acts of another. It will then become necessary to discuss the specific torts themselves. Much difficulty has been experienced by writers in classifying wrongs of this character. The following, while far from satisfactory to the author, will, it is believed, prove sufficient for all practical purposes. It is to be noted that

some of the torts may appear under two or more heads, as they may constitute an invasion of different rights. With each tort there will be considered its appropriate remedy.

A. Infringement of Personal Security.

1. Assault.
2. Battery.
3. False Imprisonment.
4. Seduction.

B. Infringement of Right of Privacy.

C. Injuries to Reputation—Defamation.

D. Infringement of Private Property.

1. Trespass.
 - a. To Land.
 - b. To Chattels.
2. Conversion.
3. Waste.
4. Fraud.
5. Slander of Title.
6. Interference with Contractual Rights.

E. Interference with Domestic Relations.

1. Injuries to Husband.
2. Injuries to Wife.
3. Injuries to Parent.
4. Injuries to Master.

F. Obstruction of Legal Remedies.

G. Perversion of Legal Remedies.

1. Malicious Prosecution.
2. Malicious Abuse of Process.
3. Unauthorized Suit in Another's Name.
4. Maintenance and Champerty.

H. Negligence.

I. Nuisance.

J. Conspiracy.

CHAPTER II

GENERAL PRINCIPLES—LEGAL RESPONSIBILITY AS DEPENDENT UPON CONDITION OF MIND AND PROOF OF DAMAGE

17. Responsibility for Voluntary Acts.
18. Intent and Motive.
19. Mental Attitude of the Party Wronged.
20. Mental Attitude of the Wrongdoer.
21. Intent of Wrongdoer—Nature and Accomplishment of Act.
22. Intent of Wrongdoer as to Result.
23. Motive of Wrongdoer.
24. Legality Dependent on Motive.
25. Damage.

RESPONSIBILITY FOR VOLUNTARY ACTS

17. For injury resulting from an act which was voluntary in the strictest sense, the common law held the doer responsible and refused recognition of accident or self-protection as a defense; but modern authorities have in many respects repudiated this doctrine.

Doctrine at Common Law

It is difficult to realize that originally the law of crime took no cognizance either of misadventure or self-protection as a defense, and the only hope of the offender lay in an appeal to the king's mercy. "The man who commits homicide by misadventure or in self-defense deserves, but needs, a pardon. Bracton cannot conceal this from us, and it is plain from multitudinous records of Henry III's reign. If the justices have before them a man who, as a verdict declares, has done a deed of this kind, they do not acquit him, nor can they pardon him; they bid him hope for the king's mercy."¹ This has been best explained by "the extreme difficulty of getting any proof of

¹ Pollock & Maitland, *History of Eng. Law*, vol. 2, p. 479.

intention or its absence in archaic procedure,"² so that it was thought better to place the burden of absolute responsibility upon the wrongdoer rather than to permit him to interpose a defense which it might be almost impossible to disprove. But, though a pardon might relieve him from punishment, it did not exempt him from the necessity of making compensation.

Now, bearing in mind what has already been said of the difference between the tort and crime concept, when regarded from the standpoint of the mental attitude of the wrongdoer,³ it may be understood why it was that the courts in the former case, while recognizing a distinction between injuries which were the result of strictly voluntary and involuntary acts, should have refused to admit such excuses as misadventure or self-defense. It has been said that "in all civil acts the law doth not so much regard the intent of the actor as the loss and damage of the party suffering. * * * For though a man doth a lawful thing, yet if any damage due thereby befall another, he shall answer for it if he could have avoided it."⁴ Though the intent may have been innocent, though the act may have been inherently lawful, though the highest degree of care may have been exercised, nevertheless compensation was awarded. Thus in *Weaver v. Ward*,⁵ decided in 1616, where the defendant while skirmishing with his train band discharged his musket, whereby plaintiff was injured, it was held that the plea of accident⁶ was insufficient, for "no man shall be excused of a trespass * * * except it be adjudged utterly without his fault; as if a man by force take my hand and strike you." It was sufficient that the defendant had willed to pull the trigger. The act was then deemed voluntary, though the result was not to be foreseen.⁷ So,

² Pollock & Maitland, *History of Eng. Law*, vol. 1, p. 55.

³ *Supra*, p. 5.

⁴ *Lambert v. Bessey*, T. Raym. 421.

⁵ Hob. 134, 80 Eng. Repr. 284.

⁶ "Casualiter et per infortunium et contra voluntatem suam."

⁷ To the same effect, *Dickenson v. Watson*, T. Jones, 205, 84 Eng. Repr. 1218; *Leame v. Bray*, 3 East, 593, 102 Eng. Repr. 724; *James v. Campbell*, 5 C. & P. 372, 24 E. C. L. 611. For an act strictly

too, though the defendant may have acted strictly in self-defense; the plaintiff having been the aggressor.⁸

Modern Doctrine

While the absurdity of this doctrine was soon admitted in criminal law, yet so firmly was the rule established that, although self-protection was recognized at an early date,⁹ still accident or misadventure does not appear to have been squarely admitted as a defense to tort actions in this country until the decision in 1835 of *Vincent v. Stinehour*,¹⁰ and in England until *Stanley v. Powell*¹¹ in 1891. The facts in the latter case, when contrasted with those in *Weaver v. Ward*, show a total repudiation of the common-law rule, for plaintiff was injured by a glancing bullet fired from the gun of defendant, there being no negligence on the latter's part. At the present time, therefore, it may be considered as thoroughly established that for purely accidental injuries arising from the doing of an inherently lawful act in a proper manner no liability may arise.¹² Though the qualifying terms "inevitable" or "unavoidable" accident have sometimes been urged, these are manifestly improper, since it is well-nigh impossible to conceive of a case which would comply with such a test.¹³

Involuntary, see *Smith v. Stone*, Style, 65, where in an action for trespass defendant pleaded that he was carried upon the land of the plaintiff by force and violence of others. This was held to be "the trespass of the party that carried the defendant upon the land, and not the trespass of the defendant."

⁸ Anonymous, Y. B. 21 & 22 Edw. I, 586; Anonymous, Y. B. 12 Edw. II, fol. 381.

⁹ *Chapleyn of Greye's Inn v. —*, Y. B. 2 Hen. IV, fol. 8, pl. 40; Anonymous, Y. B. 33 Hen. VI, fol. 18, pl. 10.

¹⁰ 7 Vt. 62, 29 Am. Dec. 145.

¹¹ *STANLEY v. POWELL*, 1 Q. B. 85, J. P. 327, 60 L. J. Q. B. 52, 63 L. T. Rep. N. S. 809, 39 Wkly. Rep. 76, Chapin Cas. Torts, 21.

¹² *Brown v. Kendall*, 6 Cush. (Mass.) 292; *Spade v. Lynn & B. R. Co.*, 172 Mass. 488, 52 N. E. 747, 43 L. R. A. 832, 70 Am. St. Rep. 298; *Brown v. Collins*, 53 N. H. 442, 16 Am. Rep. 372; *Losee v. Buchanan*, 51 N. Y. 476, 10 Am. Rep. 623; *Wall v. Lit*, 195 Pa. 375, 46 Atl. 4; *Miller v. Casco*, 116 Wis. 510, 93 N. W. 447.

¹³ Thus, where plaintiff's injuries were the result of the act of defendant's employé, who was ejecting a drunken passenger, an objection that the phrase "inevitable or unavoidable accident" was not used in the charge was not sustained. The accident was not

Not only does the modern rule find its application in cases where the defendant has acted under circumstances which gave him an absolute freedom of choice to do or not to do the particular thing from which damage resulted, as where he undertook to part fighting dogs,¹⁴ to eject a drunken passenger,¹⁵ or to maintain a boiler,¹⁶ but it has also been applied where, having been placed in a position of peril, he acts instinctively or according to his best judgment at the time. And this is true, although mature reflection might have enabled him to adopt a course which would have obviated the injury. The court will, in such cases, put itself in the position of the party from whom an instant decision is required, and will not undertake to speculate too closely at its leisure as to the means which would have been preferable. Thus recovery has been denied where the injury was received from a burning lamp thrown by defendant's servant in an endeavor to save himself,¹⁷ and from a pistol fired by one who was defending himself against the aggression of a third person.¹⁸ "That the duties and responsibilities of a person confronted with such a danger are different, and unlike those which follow his actions in performing the ordinary duties of life under other conditions, is a well-established principle of law. The rule applicable to such a condition is stated in Moak's Underhill on Torts¹⁹ as follows: 'The law presumes that the act or omission done or neglected under the influence of pressing danger was done or neglected involuntarily, and it is there said that this rule seems to be founded upon the maxim that self-preservation is the first law of nature, and that, where it is a question whether one of two men shall suffer,

inevitable in the sense that it must have happened. It is possible to eject a drunken passenger without injuring others. It was not unavoidable, for if the drunken passenger had not been admitted the injury would not have occurred. *Feary v. Metropolitan St. Ry. Co.*, 162 Mo. 75, 62 S. W. 452.

¹⁴ *Brown v. Kendall*, 6 Cush. (Mass.) 292.

¹⁵ *Spade v. Lynn & B. R. Co.*, *supra*.

¹⁶ *Losee v. Buchanan*, *supra*.

¹⁷ *Donahue v. Kelly*, 181 Pa. 93, 37 Atl. 186, 59 Am. St. Rep. 632.

¹⁸ *Morris v. Platt*, 32 Conn. 75.

¹⁹ Page 14.

each is justified in doing the best he can for himself.'"²⁰ Under such circumstances the act of the defendant is not really voluntary in the true sense of the term, however it may have been regarded at common law.

But emphasis should be laid upon the requirement that the act of defendant should not be inherently wrongful, when considered as an act, and not merely from the standpoint of the result, nor should the method of its accomplishment be unlawful. Take the case of injuries received from the discharge of a gun. If the defendant has fired to protect himself, as we have seen, there can be no liability, though he wound a bystander; but the converse is true if he fire without justification, intending to kill A., but by mistake wound B., and it makes no difference that he may have exercised the greatest care imaginable not to injure any one but A.²¹ Again, the gun may have been lawfully discharged, as in hunting, and yet the circumstances may indicate a failure to observe that degree of care which an ordinarily careful man would have exercised.²²

Based upon this principle are cases where the damage arises out of the maintenance of a nuisance.²³ For example, the operation of a powder manufactory or magazine in a thickly populated district being unlawful in itself, one who is injured by an explosion may recover, without regard to the question of negligence.²⁴ And for the same reason a similar result is reached where the action is against the owner

²⁰ *Laidlaw v. Sage*, 158 N. Y. 73, 89, 52 N. E. 679, 44 L. R. A. 216.

²¹ Thus, where defendant unlawfully threw a stick at two boys and hit a third, the fact that the injury resulted to another than was intended will not relieve him from responsibility. *Talmage v. Smith*, 101 Mich. 370, 59 N. W. 656, 45 Am. St. Rep. 414. And the same is true where one of two persons, fighting, unintentionally strikes a third. *James v. Campbell*, 5 C. & P. 372.

²² *Bullock v. Babcock*, 3 Wend. (N. Y.) 391.

²³ See *infra*, p. 557 et seq.

²⁴ *Reilly v. Erie R. Co.*, 177 N. Y. 547, 69 N. E. 1130, affirming 72 App. Div. 476, 76 N. Y. Supp. 620; *HEEG v. LICHT*, 80 N. Y. 579, 36 Am. Rep. 654, *Chapin Cas. Torts*, 377. And see *infra*, p. 558. The rule may also be applied to such cases as bulging walls. *Simmons v. Everson*, 124 N. Y. 319, 26 N. E. 911, 21 Am. St. Rep. 676.

of an animal which is of a ferocious species,²⁵ or of a species not naturally ferocious, where the owner is aware of the vicious propensities of the particular animal.²⁶

Another illustration of an act inherently unlawful is found in the case of trespass to land. If my cattle unlawfully enter upon my neighbor's close, my responsibility does not depend upon whether I have been careful or careless in keeping them.²⁷ So, too, if by a blast set off on my own land I cause earth or stone to be cast upon another's, the fact that I may have exercised the greatest care imaginable will not protect me.²⁸

INTENT AND MOTIVE

18. To determine the effect to be given to condition of mind there will be considered—

- (a) The mental attitude of the party wronged;
- (b) The mental attitude of the wrongdoer.

Intent and Motive

It is necessary to point out the distinction between intent and motive. The former is purpose or object in the concrete—the stretching out, such is the figure of the mind, towards the end desired; while the motive is that which inspires and causes that stretching out. Now, the intent may

²⁵ Such as an elephant, *FILBURN v. PEOPLE'S PALACE & AQUARIUM CO.*, L. R. 25 Q. B. D. 258, Chapin Cas. Torts, 330; a bear, *Vredenburg v. Behan*, 33 La. Ann. 627; or a buck deer in the autumn, *Congress & E. Spring Co. v. Edgar*, 99 U. S. 645, 25 L. Ed. 487. And see *infra*, p. 521.

²⁶ As in the case of a cow, *Coggsell v. Baldwin*, 15 Vt. 404, 40 Am. Dec. 686; a horse, *Reynolds v. Hussey*, 64 N. H. 64, 5 Atl. 458; or a dog, *Muller v. McKesson*, 73 N. Y. 195, 29 Am. Rep. 123, where it was observed that, "when accustomed to bite persons, a dog is a public nuisance." And see *infra*, p. 521.

²⁷ *Lyons v. Merrick*, 105 Mass. 71; *Noyes v. Colby*, 30 N. H. 143; *Wood v. Snider*, 187 N. Y. 28, 79 N. E. 858, 12 L. R. A. (N. S.) 912; *Tonawanda R. Co. v. Munger*, 5 Denio (N. Y.) 255, 49 Am. Dec. 239. And see *infra*, p. 347.

²⁸ *Hay v. Cohoes Co.*, 2 N. Y. 159, 15 Am. Dec. 279; *Cary Bros. & Hannon v. Morrison*, 129 Fed. 177, 63 C. C. A. 267, 65 L. R. A. 659. And see *infra*, p. 346.

be morally culpable, while the motive is good enough; the intent may be to inflict harm, while the motive is one of ordinary self-interest.²⁹

Thus, suppose I go before a magistrate and charge A. with having committed larceny. My *intent* is to procure his arrest and punishment. My *motive*, however, may have been good, i. e., to bring to justice one whom I honestly believe to be a criminal; or it may have been bad, in that I sought to gratify a personal grudge. So, too, the critic who published a review, while it was his purpose to disseminate his views, may have been actuated either by a desire to enlighten the public or by express malevolence against the author.³⁰

THE MENTAL ATTITUDE OF THE PARTY WRONGED

19. In general, the mental attitude of the party wronged is immaterial.

It is evident that the intent of the party wronged can, in general, have no bearing upon his right to recover; though an exception must be made in cases of fraud, since, as will be seen hereafter,³¹ it is an essential ingredient of this tort that he who seeks relief must show that he believed and acted upon the representation that was made to him.

So, too, as to motive. Where a legal right of the injured party has been infringed, the law will not refuse him redress merely because he has resorted to litigation with a view to harassing his adversary, and not with the design of protecting himself. A court, it has been said, has "no power to deny to a party his legal right because it disapproves his motives for insisting upon it."³²

²⁹ Bigelow on Torts, p. 20.

³⁰ See "Motive as an Element in Torts in the Common and in the Civil Law," by E. P. Walton, 22 Harv. Law Rev. 501.

³¹ See *infra*, p. 406.

³² *Clinton v. Myers*, 46 N. Y. 511, 520, 7 Am. Rep. 373. Here it was held that a riparian proprietor may insist upon his legal right to the natural flow of the stream at all times as against one who detains the water by means of a dam during autumn and spring,

THE MENTAL ATTITUDE OF THE WRONGDOER

20. There will be considered here—

(a) The intent of the wrongdoer—

- (1) As to the nature and accomplishment of the act;
- (2) As to the result.

(b) The motive of the wrongdoer—

- (1) Where the act is inherently lawful;
- (2) Where the act is inherently unlawful;
- (3) Where lawfulness is dependent upon motive.

INTENT OF WRONGDOER—NATURE AND ACCOMPLISHMENT OF ACT

21. Absence of a design to commit an act tortious in its nature will in general constitute no defense.

It has already been seen that in the case of acts truly involuntary the common law gave no cause of action, a doctrine which has now been extended to cases of misadventure and acts committed under an apprehension of impending peril. Bearing in mind the sense in which the word "voluntary" is now used, the rule can be laid down that the mere absence of a design to commit a wrong will not, in general, constitute an excuse. Once the intentional doing of an *act* has been established in assumed exercise of a right, the actor must likewise assume the burden of proving that such right exists in him. The auctioneer or broker who sells goods under the instructions of a principal must submit to having his right tested by that of the principal. True, he may not have intended to sell property which did not belong to such principal, yet in fact if the article belonged to a third party, from whom the goods were stolen, the fact remains that he has intentionally exercised acts of dominion, and, though morally innocent, he will be legally culpable.³³ If I enter upon your

thus insuring an equal flow. The mere fact that he does so insist from malicious motives is immaterial.

³³ SWIM v. WILSON, 90 Cal. 126, 27 Pac. 33, 13 L. R. A. 605, 25

land, though not meaning to cross the boundary line between our premises, I will be none the less guilty of trespass. One is "bound in law to know the limits of his possessions."⁸⁴ Indeed, it has been said that "the pretended ownership aggravates the wrong."⁸⁵ If a newspaper publish a defamatory article concerning A., it is no excuse that the writer intended to apply the words to B.;⁸⁶ or if the proprietor of a place of public amusement mean to eject C., but by mistake attempt to eject D.⁸⁷ Indeed, actual intent on the part of the individual held accountable may in fact be absolutely lacking, as where a master is held responsible for the wrong of a servant committed by the latter within the course of his employment.⁸⁸

But, though the intent to commit a technical wrong may be immaterial,⁸⁹ an intent of a different sort may be an essential

Am. St. Rep. 110, Chapin Cas. Torts, 189; Robinson v. Bird, 158 Mass. 357, 33 N. E. 391, 35 Am. St. Rep. 495; Hoffman v. Carow, 22 Wend. (N. Y.) 285. And see *infra*, p. 377.

⁸⁴ *Blaen Avon Coal Co. v. McCulloh*, 59 Md. 403, 417, 43 Am. Rep. 560; *Maye v. Yappen*, 23 Cal. 306; *Pearson v. Inlow*, 20 Mo. 322, 64 Am. Dec. 189; *Wood v. New York Cent. & H. R. R. Co.*, 184 N. Y. 290, 77 N. E. 27; *McCloskey v. Powell*, 123 Pa. 62, 16 Atl. 420, 10 Am. St. Rep. 512; *Perry v. Jefferies*, 61 S. C. 292, 39 S. E. 515.

⁸⁵ *DOUGHERTY v. STEPP*, 17 N. C. 371, Chapin Cas. Torts, 179, per Ruffin, C. J. This, however, has not met with universal acquiescence, and some of the courts have held that the honesty of the mistake may bear upon the quantum of damages. Thus, if trees are cut in good faith, the measure of damages is their value as standing trees, and not their value as logs. *Clark v. Holdridge*, 12 App. Div. 613, 43 N. Y. Supp. 115. Contra, *McCloskey v. Powell*, 123 Pa. 62, 16 Atl. 420, 10 Am. St. Rep. 512, where a statutory penalty of treble damages was allowed.

⁸⁶ *Morey v. Morning Journal Ass'n*, 123 N. Y. 207, 25 N. E. 161, 9 L. R. A. 621, 20 Am. St. Rep. 730; *Griebel v. Rochester Printing Co.*, 60 Hun, 319, 14 N. Y. Supp. 848; *Taylor v. Hearst*, 107 Cal. 262, 40 Pac. 392.

⁸⁷ *Davis v. Tacoma Ry. & Power Co.*, 85 Wash. 203, 77 Pac. 209, 66 L. R. A. 802. Here defendant's employé had been informed that a woman of the criminal class had entered a public park which the defendant owned. He mistook plaintiff for the woman and ordered her to leave. Discovering his mistake almost immediately, he apologized to her and called the attention of defendant's manager to the mistake, when the latter likewise apologized.

⁸⁸ See *infra*, p. 209.

⁸⁹ As where cattle belonging to plaintiff became mingled with

element of certain wrongs. Take as an illustration the tort conversion.⁴⁰ The exercise of dominion over the personal property of another may or may not give a cause of action, dependent upon whether the doer has acted in subordination to or in denial of the rights of the true owner.⁴¹ So one who sues for the tort fraud must prove that the defendant had made a false representation with the intent that it be acted upon,⁴² though this intent is regarded as established when the attending circumstances justify the inference.⁴³ Thus, false statements regarding financial condition made to a mercantile agency will be regarded as having been made for the purpose of inducing subscribers to extend credit.⁴⁴ The distinction between intent and motive is strongly apparent in cases of fraud, since, though the *intent* must be to deceive, the

defendant's cattle, while the latter were being driven along the highway, and defendant, after rejecting all the cattle which he believed did not belong to him, nevertheless retained and slaughtered under a mistake cattle belonging to the plaintiff, his innocence will not protect him. *Dexter v. Cole*, 6 Wis. 319, 70 Am. Dec. 465.

⁴⁰ See *infra*, p. 370.

⁴¹ See *infra*, p. 371. Though this point will be discussed later, two cases may be referred to here as illustrating the difference between acting in defiance of the true owner's rights and acting in subordination to them. In *Hobart v. Hagget*, 12 Me. 67, 28 Am. Dec. 159, defendant purchased an ox belonging to plaintiff and took from plaintiff's possession the ox which he supposed he had purchased. As a matter of fact plaintiff did not intend to sell that particular ox, but supposed that he was selling another. The minds of the parties did not meet, and therefore defendant had no title to the ox. But he nevertheless took it in the assertion of a right in himself. In *Frome v. Dennis*, 45 N. J. Law, 515, plaintiff had left his plow on C.'s land with C.'s consent. Later the farm passed into the possession of H., and defendant, supposing the plow belonged to H., borrowed it from him and later returned it, still supposing it to be H.'s property. Whatever defendant did here was without reference to and was in subordination of the rights of the true owner.

⁴² See *infra*, p. 404. *Buschman v. Codd*, 52 Md. 202; *Hunnewell v. Duxbury*, 154 Mass. 286, 28 N. E. 267, 13 L. R. A. 733; *Brackett v. Griswold*, 112 N. Y. 454, 20 N. E. 376; *McAleer v. McMurray*, 58 Pa. 126.

⁴³ *Collins v. Denison*, 12 Metc. (Mass.) 549.

⁴⁴ *Tindle v. Birkett*, 171 N. Y. 520, 64 N. E. 210, 89 Am. St. Rep. 822; *Genesee Co. Sav. Bank v. Michigan Barge Co.*, 52 Mich. 164, 43S, 17 N. W. 790, 18 N. W. 206. And see *infra*, p. 404.

motive, whether expectation of advantage to the party himself, or ill will towards the other, or good will towards a third party, will be immaterial.⁴⁵

INTENT OF WRONGDOER AS TO RESULT

22. Responsibility for the result of the wrongdoer's act or omission does not depend on whether he intended to produce it.

Later there will be discussed the principles applied to determine the legal existence of cause and effect.⁴⁶ Suffice it to say that it is not essential that the wrongdoer should have foreseen the specific consequences which actually occurred. Instances are almost legion. Thus, where a municipality negligently permitted a board walk to fall into disrepair, it was held responsible for injuries received by one who tripped over the loose end of a board raised by the act of another coming in an opposite direction, who stepped on the other end.⁴⁷ In another case defendant sold ball cartridges to children aged 10 and 12. The children left a pistol loaded with the cartridges on the floor of their home, where a younger brother of 6 picked it up and discharged it, inflicting injuries, from which death resulted.⁴⁸ Again, a railroad is responsible where one of its trains, negligently managed, struck a third party, who at the time was carrying a box of tools, one of which was thrown to some distance, striking the plaintiff.⁴⁹

⁴⁵ *Cowley v. Smyth*, 46 N. J. Law, 380, 50 Am. Rep. 432. "It is fraud in law if a party makes representations which he knows to be false and injury ensues, although the motive from which the representations proceeded may not have been bad; the person who makes such representations is responsible for the consequences." *Foster v. Charles*, 7 Bing. 105, 107, 8 L. J. C. P. O. S. 118, 31 Rev. Rep. 446, 20 E. C. L. 55, per Tindal, C. J.

⁴⁶ See *infra*, pp. 76-104.

⁴⁷ *City of Dixon v. Scott*, 181 Ill. 116, 54 N. E. 897.

⁴⁸ *Binford v. Johnston*, 82 Ind. 426, 42 Am. Rep. 508.

⁴⁹ *Hammill v. Pennsylvania R. Co.*, 56 N. J. Law, 370, 29 Atl. 151, 24 L. R. A. 531.

The case of *Estes v. Missouri Pac. R. Co.*⁵⁰ was one where considerable imagination would certainly have been required to foresee the result. Plaintiff was a passenger on defendant's train. Through defendant's negligence a collision occurred. Thereafter some one stated in plaintiff's hearing that another train was approaching and that another collision was imminent, whereupon plaintiff left the car and went to the side of the track, where she was poisoned by poison ivy.

But the law does not stop with the rule that the wrongdoer need not intend to accomplish *the* specific injury which resulted in order that he may be held. A tort-feasor may be bound to render compensation, though he may not have intended that *any* injury should ensue.⁵¹ Hence, where defendant's servants wrongfully removed the fixtures and connection of a rival gas company from plaintiff's lodging house, a recovery was allowed for the loss of profits from the latter's tenants. Nor was it material that it was not in the defendant's contemplation that any loss would occur.⁵²

MOTIVE OF WRONGDOER

23. In determining legal liability, the motive with which the act was done is not, in general, open to consideration.

Motive—Act Inherently Lawful

It has already been seen that the motive which prompts the plaintiff in standing upon his technical rights cannot be considered. The same reasons will apply where the conduct of the defendant is in question. The civilians, it is true, deemed an act, otherwise lawful in itself, illegal if done with the malicious motive of injuring a neighbor; but this principle has not found place in our law, save in a very limited sense.⁵³

⁵⁰ 111 Mo. App. 1, 85 S. W. 909.

⁵¹ *Bonnell v. Smith*, 53 Iowa, 281, 5 N. W. 128; *Reynolds v. Plereson*, 29 Ind. App. 273, 64 N. E. 484.

⁵² *Kentucky Heating Co. v. Hood*, 133 Ky. 383, 118 S. W. 337, 22 L. R. A. (N. S.) 588, 134 Am. St. Rep. 457.

⁵³ *Chasemore v. Richards*, 7 H. L. Cas. 349, 388.

"If a man has a legal right, courts will not inquire into the motive by which he is actuated in enforcing the same."⁵⁴ Though the results may at times seem harsh, it is preferable that the rights and liabilities of the individual be marked by defined lines, rather than be measured by a shifting standard, to be fixed in each case upon a consideration of the ethical propriety of the defendant's act. It seems better, therefore, to hold that "malicious motives make a bad act worse,"⁵⁵ but they cannot make that wrong which in its own essence is lawful. * * * Any transaction, which would be lawful and proper if the parties were friends, cannot be made the foundation of an action merely because they happen to be enemies. As long as a man keeps himself within the law by doing no act which violates it, we must leave his motives to Him who searches the heart."⁵⁶ In a recent case in Iowa⁵⁷ plaintiff's wife had been awarded a decree of divorce and the custody of their minor child. She took up her residence with defendant, her father. The son having died, it was held that plaintiff might maintain no action against the father for maliciously refusing to permit him to attend the funeral. Defendant had a legal right to exclude the husband from his house at any time and under all circumstances, just as he could have excluded any one. Having the right to select his guests or visitors, his malicious motive in excluding one of them does not give that one a right of recovery.

⁵⁴ "A different rule," it was said, "would lead to the encouragement of litigation and prevent in many instances a complete and full enjoyment of the right of property. * * * An idle threat to do what is perfectly lawful, or declarations which assert the intentions of the owner, might often be construed as evidencing an improper motive and a malignant spirit, when in point of fact they merely stated the actual rights of the party. Malice might easily be inferred sometimes from idle and loose declarations, and a wide door be opened by such evidence to deprive an owner of what the law regards as well-defined rights." *Phelps v. Nowlen*, 72 N. Y. 39, 45, 28 Am. Rep. 93, per Miller, J.

⁵⁵ And hence may permit the injured party to recover exemplary damages.

⁵⁶ *Jenkins v. Fowler*, 24 Pa. 308, 310, per Black, J.

⁵⁷ *RADER v. DAVIS*, 154 Iowa, 306, 134 N. W. 849, 38 L. R. A. (N. S.) 131, Ann. Cas. 1914A, 1245, Chapin Cas. Torts, 27.

One bank cannot complain that another bought up and kept out of circulation a large amount of the former's bills and notes, refusing to exchange them for other funds, and demanded specie, though the motive which inspired such a course was to inflict injury on the complaining institution by bringing its bills into discredit and preventing their circulation.⁵⁸ Nor can plaintiff, the proprietor of an independent theater, recover from a corporation owning the principal theaters in which burlesque shows are given in the chief cities, because it required the owners of such shows to agree to refrain from playing in any theater not owned by defendant as a condition of booking, though defendant's motive was ill will to the plaintiff.⁵⁹

Other illustrations will be found in the note.⁶⁰

Act Inherently Unlawful

The existence of good motives will, in general, no more operate to legalize an act inherently unlawful than will their absence affect the legality of an act inherently lawful, though, as has already been intimated, the fact that defendant did what he did with a proper purpose may prevent the jury from imposing exemplary damages.

Thus, where defendant, being sued for trespass for taking corn, pleaded that the corn was in danger of being eaten by cattle, wherefore he removed it to the barn of the plaintiff, the owner, such plea was held bad.⁶¹ Nor is the owner of a lot, who is excavating thereon, justified in going upon the property of his neighbor for the purpose of shoring up the latter's building against his wishes. It matters not that the act was without malice, and was largely prompted by a design to

⁵⁸ *South Royalton Bank v. Suffolk Bank*, 27 Vt. 505.

⁵⁹ *Roseneau v. Empire Circuit Co.*, 131 App. Div. 429, 115 N. Y. Supp. 511.

⁶⁰ *McCune v. Norwich City Gas Co.*, 30 Conn. 521, 79 Am. Dec. 278; *Kelly v. Chicago, M. & St. P. Ry. Co.*, 93 Iowa, 436, 61 N. W. 957; *Clinton v. Myers*, 46 N. Y. 511, 7 Am. Rep. 373; *Lancaster v. Hamburger*, 70 Ohio St. 156, 71 N. E. 289, 65 L. R. A. 856, 1 Ann. Cas. 248; *Smith v. Johnson*, 76 Pa. 191; *Allen v. Flood*, [1898] App. Cas. 1, 62 J. P. 595, 67 L. J. Q. B. 258, 77 L. T. Rep. N. S. 717, 46 Wkly. Rep. 258.

⁶¹ *Anonymous*, Y. B. 21 Hen. VIII, 27.

minimize the injury which his neighbor would otherwise have suffered; and this, although, had the building fallen, there might have been no liability.⁶² "That which is essentially a trespass cannot become lawful from being done with good intentions."⁶³

If this is so where a good motive has been shown, it must necessarily be true of a case where it can only be said that bad motive was lacking.⁶⁴ The law does not encourage intermeddling.

LEGALITY DEPENDENT UPON MOTIVE

24. In a few instances, which must be specially enumerated, the legality of the act is made to depend upon the motive of the actor.

There are some torts, however, where the culpable mind of the actor must be proven. In slander of title, which consists in the publication of false statements concerning the title to or quality or quantity of lands or goods,⁶⁵ malicious prosecution,⁶⁶ and in certain instances of interference with contrac-

⁶² *Ketcham v. Cohn*, 2 Misc. Rep. 427, 22 N. Y. Supp. 181.

⁶³ *Bruch v. Carter*, 32 N. J. Law, 554, 562, per Woodhull, J. "Every one must be sure of his legal right when he invades the possessions of another." *Cubit v. O'Dett*, 51 Mich. 347, 351, 16 N. W. 679, 680, per Cooley, J. And see *G. B. & L. Ry. Co. v. Eagles*, 9 Colo. 544, 13 Pac. 696.

⁶⁴ Thus, in an action brought against selectmen who have unlawfully refused to receive plaintiff's vote, a lack of malicious motives on the defendants' part will constitute no defense. "Now," it is said, "if a party duly qualified is unjustly prevented from voting, and yet can maintain no action for so important an injury unless he is able to prove an ill design in those who obstruct him, he is entirely shut out from a judicial investigation of his right, and succeeding injuries may be founded on one originally committed by mistake. He may thus be perpetually excluded from the common privilege of citizens, without any lawful means of asserting his rights and restoring himself to the ranks of an active citizen." *Lincoln v. Hapgood*, 11 Mass. 350, 355, per Parker, C. J. To the same effect, *Larned v. Wheeler*, 140 Mass. 390, 5 N. E. 290, 54 Am. St. Rep. 483.

⁶⁵ See *infra*, p. 422.

⁶⁶ See *infra*, p. 487.

tual rights,⁶⁷ though the injured party, to secure a recovery, need not establish that the doer acted from express malevolence, he must nevertheless show that there was the absence of proper motive, which in legal significance is deemed "malice."⁶⁸ The same is true of defamation, where the defense of qualified privilege, or of fair comment upon matters of public interest, is interposed.⁶⁹

In some instances, too, the Legislature has seen fit to create a cause of action and make its existence dependent on motive; and the same result has been accomplished by decisions of the courts, which have made the malice of the actor a determinative factor. Of these, the case of "spite fences" is probably the best illustration. Suppose that from malicious motives, and not because I am prompted by a desire to improve my property, I erect a fence which obstructs my neighbor's light and air. Now, by the doctrine generally prevailing in this country, the fact that my motives were malicious cannot make my action unlawful.⁷⁰ But this rule is by no means universally applied, for it has been held that proof of malice is sufficient on which to base a cause of action,⁷¹ and in some states this has been provided by statute.⁷²

⁶⁷ See *infra*, p. 424 et seq.

⁶⁹ See *infra*, p. 339.

⁶⁸ See notes 65, 66, 67, and 69.

⁷⁰ "To permit a man to cause a certain injurious effect upon the premises of his neighbor by the erection of a structure on his own premises if such structure is beneficial or ornamental, and to prohibit him from causing the same effect in case the same structure is neither beneficial or ornamental, but erected from motives of pure malice, is not protecting a legal right, but is controlling his moral conduct." *Letts v. Kessler*, 54 Ohio St. 73, 42 N. E. 765, 40 L. R. A. 177, per Burkett, J. To the same effect, *Parker v. Foote*, 19 Wend. (N. Y.) 309; *Levy v. Brothers*, 4 Misc. Rep. 48, 23 N. Y. Supp. 825; *Guest v. Reynolds*, 68 Ill. 478, 18 Am. Rep. 570; *Metzger v. Hochrein*, 107 Wis. 267, 83 N. W. 308, 50 L. R. A. 305, 81 Am. St. Rep. 841.

⁷¹ *Burke v. Smith*, 69 Mich. 380, 37 N. W. 838; *Flaherty v. Moran*, 81 Mich. 52, 45 N. W. 381, 8 L. R. A. 183, 21 Am. St. Rep. 510.

⁷² *Rideout v. Knox*, 148 Mass. 368, 19 N. E. 390, 2 L. R. A. 81, 12 Am. St. Rep. 560; *Horan v. Byrnes*, 72 N. H. 93, 54 Atl. 945, 62 L. R. A. 602, 101 Am. St. Rep. 670; *Id.*, 72 N. H. 600, 58 Atl. 42; *Lord v. Langdon*, 91 Me. 221, 39 Atl. 552; *Karasek v. Peler*, 22 Wash. 419, 61 Pac. 33, 50 L. R. A. 345. "The statute speaks of

Another illustration is found where the owner of real property destroys his neighbor's supply of percolating subterranean water.⁷³ Though many courts have held that his right to deal therewith is absolute, and cannot be affected by the fact that he was actuated by malice,⁷⁴ others of equal authority have denied the right of interference, unless exercised by the landowner "for the benefit and improvement of his own property or for his own beneficial use."⁷⁵

DAMAGE

25. There will now be considered—

- (a) Under what circumstances a legal right may be deemed to have been violated, with consequent assumption of damage; and—
- (b) Where judicial recognition of a wrong will be conditioned upon the proof of injurious consequences flowing therefrom.

It has frequently been asserted that a cause of action will arise out of injury to a legal right, though the party wronged

the structure intended as a 'malicious erection' and one the intent of which is to annoy and injure any proprietor of adjacent land. We think we do not go too far in saying that this malicious intent must be so predominating as a motive as to give character to the structure." *Gallagher v. Dodge*, 48 Conn. 387, 392, 40 Am. Rep. 182, per Loomis, J.

⁷³ What is said here only applies to *percolating* waters, not to subterranean waters flowing in a defined channel. In the latter case the rules governing surface streams apply. *Gould on Waters*, §§ 280, 281.

⁷⁴ *Wheelock v. Jacobs*, 70 Vt. 162, 40 Atl. 41, 43 L. R. A. 105, 67 Am. St. Rep. 659; *Huber v. Merkel*, 117 Wis. 355, 94 N. W. 354, 62 L. R. A. 589, 98 Am. St. Rep. 933; *Mayor, etc., of Bradford v. Pickles*, [1895] App. Cas. 587, 64 L. J. Ch. N. S. 759, 73 L. T. N. S. 353.

⁷⁵ *Stillwater Water Co. v. Farmer*, 89 Minn. 58, 66, 93 N. W. 907, 60 L. R. A. 875, 99 Am. St. Rep. 541, per Collins, J.; *Barclay v. Abraham*, 121 Iowa, 619, 96 N. W. 1080, 64 L. R. A. 255, 100 Am. St. Rep. 365; *Chesley v. King*, 74 Me. 164, 43 Am. Rep. 569; *Greenleaf v. Francis*, 18 Pick. (Mass.) 117 (semble); *Wheatley v. Baugh*, 25 Pa. 528, 64 Am. Dec. 721 (semble).

may have suffered no damage.⁷⁶ But this statement is open to the serious objection that it is almost meaningless. "The simple truth is that sometimes plaintiff can recover when he has not shown damage, and sometimes he cannot. On the one hand, mere damage may not constitute a cause of action, in the absence of violation of duty. On the other hand, mere violation of duty may not constitute a cause of action, in the absence of damage. There may be no such thing as a legal wrong without damage; but sometimes there cannot be a legal wrong unless there has been damage. In some cases the law presumes damage, and in some cases damage must be proved. In other words, there are two kinds of right—one a simple right, the infringement of which is, in the absence of exceptional circumstances, necessarily actionable; the other is a right not to be harmed, the violation of which is actionable only when harm is suffered."⁷⁷ In reality, therefore, there is no such thing as *injuria sine damno*; for *injuria* must of necessity include damage.⁷⁸

We are therefore obliged to place tortious wrongs in one of two classes. In the first, the law will assume the existence of damage, and will give recovery, though the extent of the latter will depend upon the evidence. In the second class, the existence of damage is not assumed, but, on the contrary,

⁷⁶ "I am not able to understand how it can correctly be said, in a legal sense, that an action will not lie even in case of a wrong or violation of a right, unless it is followed by some perceptible damage, which must be established as a matter of fact; in other words, that *injuria sine damno* is not actionable." *Webb v. Portland Mfg. Co.*, 3 Sumn. 189, Fed. Cas. No. 17,322, per Story, J.

⁷⁷ *Jaggard on Torts*, p. 80.

⁷⁸ "As an injury or violation of his right necessarily imports damage, there can be no such thing as an injury without damage. An injury is a wrong; and for the redress of every wrong there is a remedy. A wrong is a violation of one's right; and for the vindication of every right there is a remedy. Want of right and want of remedy are justly said to be reciprocal. Where, therefore, there has been a violation of a right, the person injured is entitled to an action. If he is entitled to an action, he is entitled at least to nominal damages, or else he would not be entitled to a recovery. Such damages are given, in order to vindicate the right which has been invaded; and such further damages are awarded as are proper to remunerate him for any specific damage which he has

must be shown. An act or omission then becomes wrongful as to any particular individual only because he has suffered injurious consequences.

Damage Presumed

It is evident that, where there has been a direct invasion of person or property, the cause of action is complete in itself. "So if a man give another a cuff on the ear, although it cost him nothing, no, not so much as a little diachylon, yet he shall have his action; for it is a personal injury."⁷⁹ Indeed, an act of this character may have been done under such circumstances that the shame and humiliation suffered by the party assailed would warrant the imposition of heavy damages, though the physical suffering was negligible.

It is when we come to the invasion of property rights, however, that we find the best illustrations. If I unlawfully enter upon my neighbor's land, though I merely pass over it, yet damage will be assumed, if it be no more than the tramping of the herbage.⁸⁰ Nor need there have been any actual entry, as the term is commonly understood; for, as will be seen when the subject is discussed,⁸¹ it is not essential that there be a touching of the soil. The maintenance of a cornice,⁸² or a flashboard,⁸³ over the division line, though it merely be for an inch, will be deemed a continuous trespass.⁸⁴

"If a person fish in another's fishery and catch nothing,"⁸⁵

sustained." *Parker v. Griswold*, 17 Conn. 288, 303, 42 Am. Dec. 739, per Storrs, J.

⁷⁹ *Ashby v. White*, 2 Ld. Raym. 938, 955, 92 Eng. Repr. 126, 1 Salk. 19, 91 Eng. Repr. 19, per Holt, L. J.

⁸⁰ *Welch v. Seattle & M. R. Co.*, 56 Wash. 97, 105 Pac. 166, 26 L. R. A. (N. S.) 1047; *Dixon v. Clow*, 24 Wend. (N. Y.) 188; *DOUGHERTY v. STEPP*, 18 N. C. 371, Chapin Cas. Torts, 179. And see *infra*, p. 346.

⁸¹ See *infra*, p. 348.

⁸² *Harrington v. McCarthy*, 169 Mass. 492, 48 N. E. 278, 61 Am. St. Rep. 298.

⁸³ *Puerto v. Chieppa*, 78 Conn. 401, 62 Atl. 664.

⁸⁴ See *infra*, p. 348.

⁸⁵ *Tunbridge Wells' Dipper Case*, 2 Wills. 414.

or unlawfully divert,⁸⁶ obstruct,⁸⁷ or foul a stream,⁸⁸ or overflow his neighbor's lands,⁸⁹ he is bound at least to pay nominal damages.

The rule has a substantial reason to support it. If the owner of the land were not permitted to bring his action until substantial damage had been suffered, he might eventually be deprived of his property, since by the continuance of the wrongful act for a period of twenty years the wrongdoer might acquire a right by prescription.⁹⁰

To deprive a qualified elector of his right to vote constitutes a distinct tort in itself,⁹¹ and so, too, is the refusal of a candidate's demand for a poll; it being immaterial that the result of the election would remain unchanged.⁹²

Under such circumstances showing the invasion of a legal right, the maxim "*de minimis non curat lex*"⁹³ can have no application.⁹⁴ For that matter, the cause of action will be

⁸⁶ *Blanchard v. Baker*, 8 Me. 253, 23 Am. Dec. 504; *Parker v. Griswold*, 17 Conn. 288, 42 Am. Dec. 739.

⁸⁷ *Branch v. Doane*, 18 Conn. 233; *Bower v. Hill*, 1 Bing. N. Cas. 549, 27 E. C. L. 759.

⁸⁸ *Wood v. Waud*, 3 Exch. 748, 13 Jur. 742, 18 L. J. Exch. 305.

⁸⁹ *Ellington v. Bennett*, 59 Ga. 286; *Dorman v. Ames*, 12 Minn. 451 (Gil. 347); *Jones v. Hannovan*, 55 Mo. 462.

⁹⁰ "Wherever any act injures another's right, and would be evidence in future in favor of the wrongdoer, an action may be maintained for an invasion of the right, without proof of any specific injury." *Mellor v. Spateman*, 1 Saund. 343, 346, note 2, 85 Eng. Repr. 495 (quoted in *Searles v. Cronk*, 38 How. Prac. [N. Y.] 320, 324, and *Delaware & H. Canal Co. v. Torrey*, 33 Pa. 143, 149). If an unlawful diversion of a stream is suffered for 20 years, it ripens into a right which cannot be controverted. If the party injured cannot be allowed in the meantime to vindicate his right by action, it would depend upon the will of others whether he should be permitted, or not, to enjoy that species of property. *Blanchard v. Baker*, 8 Me. 253, 23 Am. Dec. 504. To the same effect, *Francis v. Schoellkopf*, 53 N. Y. 152. And see cases cited in preceding notes.

⁹¹ *Larned v. Wheeler*, 140 Mass. 390, 5 N. E. 290, 54 Am. Rep. 483; *Lincoln v. Hapgood*, 11 Mass. 350; *Ashby v. White*, 2 Ld. Raym. 938, 92 Eng. Repr. 126, 1 Salk. 19, 91 Eng. Repr. 19.

⁹² *Starling v. Turner*, 2 Lev. 50, 83 Eng. Repr. 444, 2 Vent. 25, 86 Eng. Repr. 287; *Lincoln v. Hapgood*, 11 Mass. 350.

⁹³ "The law takes no account of trifles."

⁹⁴ *Boody v. Watson*, 64 N. H. 162, 9 Atl. 794; *Wartman v. Swin-*

deemed perfect, even though the immediate result of the wrongdoer's act has been beneficial to the party wronged, as where the land on which trees were unlawfully cut was shown to be worth more in its cleared than in its natural state,⁹⁵ where a ditch made by defendant, while it forced some water upon plaintiff's land at a time of heavy rains, yet drained as much or more,⁹⁶ a fence standing upon plaintiff's property, a portion of which was cut off by defendant, was improved thereby,⁹⁷ or an old mill torn down and a new mill erected in its place.⁹⁸

"The owner of a horse might be benefited by a skillful rider taking the horse from the pasture and using him, yet the law would give damages, and under circumstances very serious damages, for such an act. * * * The rule is necessary for the general protection of property; and a greater evil could scarcely befall a country than the rule being frittered away or relaxed in the least, under the idea that, although an exclusive right be violated, the injury is trifling, or, indeed, nothing at all." ⁹⁹

Proof of Damage Essential

The instances chiefly to be noted in which the cause of action will be regarded as perfect only when damage is shown to have resulted actually to the party seeking redress are fraud, negligence, certain cases of defamation, slander of title, and nuisance. Each will be considered more fully hereafter.

As to the first, it may be said that, though I have made a false statement, knowing its falsity and intending it to be acted upon, though it was acted upon in a belief in its truth, yet if no injurious results have followed, I am not accountable;

dell, 54 N. J. Law, 589, 25 Atl. 356, 18 L. R. A. 44; Seneca Road Co. v. Auburn & R. R. Co., 5 Hill (N. Y.) 170; Fullam v. Stearns, 30 Vt. 443.

⁹⁵ Huddleston v. Johnson, 71 Wis. 336, 37 N. W. 407.

⁹⁶ Jones v. Hannovan, 55 Mo. 462. And see East Jersey Water Co. v. Blgelow, 60 N. J. Law, 201, 38 Atl. 631.

⁹⁷ Fisher v. Dowling, 66 Mich. 370, 33 N. W. 521.

⁹⁸ Jewett v. Whitney, 43 Me. 242.

⁹⁹ Seneca Road Co. v. Auburn & R. R. Co., 5 Hill (N. Y.) 170, 176, per Cowen, J.

for it is thoroughly established that fraud without damage will not sustain an action.¹⁰⁰

Again, although I have been guilty of the grossest negligence, having omitted to exercise the very slightest degree of care, it is evident that the world at large cannot complain, but only some individual who has suffered. It is the occurrence of the damage that perfects the cause of action.¹⁰¹ Thus, where the cashier of a bank, under the direction of its president, forwarded securities to brokers for sale, and received a portion of their value, but negligently omitted to collect the balance, it was held that, as the brokers remained financially responsible and were liable for the balance to the bank, the latter had sustained no injury from the cashier's negligence, and the cashier was not liable.¹⁰²

Defamation, whether appealing to the ear,¹⁰³ or to the eye,¹⁰⁴ occupies, as will be seen later on, a peculiar position. Suffice it to say that the statement or charge may be of so grave a character that, although damage is an essential element of the tort, the law will under such circumstances assume its existence. Under what conditions this rule may be invoked will be discussed in connection with this specific wrong.¹⁰⁵

Special damage must also be alleged and proved in actions for slander of title.¹⁰⁶

¹⁰⁰ *Freeman v. McDaniel*, 23 Ga. 354; *Danforth v. Cushing*, 77 Me. 182; *Freeman v. Venner*, 120 Mass. 424; *Alden v. Wright*, 47 Minn. 225, 49 N. W. 767; *Byard v. Holmes*, 34 N. J. Law, 296; *Aron v. De Castro*, 36 N. Y. St. Rep. 716, 13 N. Y. Supp. 372, affirmed 131 N. Y. 648, 30 N. E. 491. And see *infra*, p. 416 et seq.

¹⁰¹ *Jones v. Texas & P. R. Co.*, 125 La. 542, 51 South. 582, 136 Am. St. Rep. 339; *Sullivan v. Old Colony St. Ry.*, 200 Mass. 303, 86 N. E. 511; *Ochs v. Public Service R. Co.*, 81 N. J. Law, 661, 80 Atl. 495, 36 L. R. A. (N. S.) 240, Ann. Cas. 1912D, 255; *Bluedorn v. Missouri Pac. Ry. Co. (Mo.)* 24 S. W. 57. And see *infra*, p. 539.

¹⁰² *Commercial Bank of Albany v. Ten Eyck*, 48 N. Y. 305.

¹⁰³ Slander.

¹⁰⁴ Libel.

¹⁰⁵ See *infra*, pp. 304, 314.

¹⁰⁶ *Burkett v. Griffith*, 90 Cal. 532, 27 Pac. 527, 13 L. R. A. 707, 25 Am. St. Rep. 151; *DOOLING v. BUDGET PUB. CO.*, 144 Mass. 258, 10 N. E. 809, 59 Am. Rep. 83, Chapin Cas. Torts, 235; *Tobias v. Harland*, 4 Wend. (N. Y.) 537. And see *infra*, p. 421.

A nuisance, whether consisting of the unwarrantable, unreasonable, or unlawful use by a person of his own property, real or personal, to the injury of another, which is referred to as a "private nuisance,"¹⁰⁷ or which affects rights enjoyed by the public generally,¹⁰⁸ which is denominated a "public nuisance,"¹⁰⁹ requires a showing of some damage suffered by the one who seeks redress.¹¹⁰ And though the individual is not precluded from recovering, as an individual, damage arising out of the maintenance of a public nuisance, he must show that such damage is peculiar to himself, and not of the general character which members of the community have suffered as such.¹¹¹

Now, where the right is dependent upon the existence of damage, as in the cases referred to and in other instances which will be mentioned when the specific torts are considered, it is evident that the maxim "*de minimis non curat lex*" can properly be applied. If, therefore, the action is trivial or vexatious, the courts may refuse to entertain it.¹¹² But such cases must necessarily be rare, and the doctrine should not be lightly invoked.

¹⁰⁷ *HEEG v. LICHT*, 80 N. Y. 579, 582, 36 Am. Rep. 654, Chapin Cas. Torts, 377.

¹⁰⁸ As the right of navigating a river or traveling on a public highway, rights to which every citizen is entitled.

¹⁰⁹ *King v. Morris & E. R. Co.*, 18 N. J. Eq. 397, 399.

¹¹⁰ This is shown by the fact that the harm of which the plaintiff complains must be substantial and not merely fanciful. *Rogers v. Elliott*, 146 Mass. 349, 15 N. E. 768, 4 Am. St. Rep. 316; *Sparhawk v. Union Pass. R. Co.*, 54 Pa. 401; *Price v. Grantz*, 118 Pa. 402, 11 Atl. 794, 4 Am. St. Rep. 601.

¹¹¹ *Francis v. Schoellkopf*, 53 N. Y. 152. And see *infra*, p. 560.

¹¹² *Steinbach v. Hill*, 25 Mich. 78; *Price v. Grantz*, 118 Pa. 402, 11 Atl. 794, 4 Am. St. Rep. 601. "It is not only to those who are greatly damaged by the illegal act of another to whom the law gives redress; but its vindication extends to every person who is damaged at all, unless, indeed, the loss sustained is so small as to be unnoticeable by force of the maxim, '*De minimis non curat lex*.'" *Beseman v. Pennsylvania R. Co.*, 50 N. J. Law, 235, 13 Atl. 164, per Beasley, J.

CHAPTER III

GENERAL PRINCIPLES (CONTINUED)—LIABILITY UNDER THE LEGAL RULES DEFINING CAUSE AND EFFECT

- 26. Proximate Cause.
- 27. Intervention of Natural Force.
- 28. Fright and Mental Anguish.
- 29. Intervention of Voluntary Act or Neglect.
- 30. Intervention of Irresponsible Individual or Unconscious Instrument.
- 31. Arbitrary Rule in Certain Cases of Fire.
- 32. Concurring Cause.
- 33. Accompanying Condition.
- 34. Functions of Court and Jury.

PROXIMATE CAUSE

- 26. To determine responsibility, the law will consider the proximate and not the remote cause of an injury.

Philosophically speaking, the sum of all the antecedents of any event constitutes its cause.¹ But it is obvious that such a rule could not be applied in determining legal responsibility without producing absurd results. "It were infinite," said Lord Bacon, "for the law to consider the causes of causes and their impulsions one upon another; therefore it contenteth itself with the immediate cause and judgeth of acts by that, without looking to any further degree."² "The maxim of the schoolmen, 'causa causantis causa est causati,'³ may be true; but it obviously leads into a labyrinth of refined and bewildering speculation, whither the law cannot attempt to follow."⁴

¹Atchison, T. & S. F. R. Co. v. Bales, 16 Kan. 252, 256, per Valentine, J.

²Bacon, Max. Reg. 1, quoted in Marble v. City of Worcester, 4 Gray (Mass.) 395, 411.

³"The cause of the thing causing is the cause of the thing caused."

⁴Gilman v. Noyes, 57 N. H. 629, per Cushing, J.

The following abridged news item suggests the difficulties which would be encountered "if the cause of the thing causing" were to

In a sense, "the true rule, broadly stated, is that the wrongdoer is liable for the damage which he causes by his misconduct. But this rule must be practicable and reasonable, and hence it has its limitations." ⁵ A man's responsibility "must end somewhere." ⁶ Hence the maxim, "Causa proxima non remota spectatur." ⁷ While this principle is universally accepted, its application is frequently attended with considerable difficulty, and it cannot be said that the tests which have been applied are entirely satisfactory, however proper the final results of the decisions themselves may have been. ⁸

be sought without restriction. Initials are substituted for names: A., the janitor of ——— Graham avenue, Brooklyn, having a sore hand, asked B. to shovel the snow from the roof. B. started to do so. C., a tenant, stuck his head out of the window and received a shovelful in his face. He went to the roof and engaged in a fight with B. D., another tenant, heard the disturbance and fired his revolver out of the window. The bullet just missed E., a woman on the lower floor, and she cried, "Fight!" F., in the street, heard her and misunderstanding her, called, "Fire!" G., hearing F., turned in a fire alarm. The engine driven by H. dashed through the street in response and grazed a carriage driven by I. I.'s horse became frightened, ran away, and injured J. *Query*: Is A. to be held liable to J. on the theory that, without his request to B., the injury would never have occurred? If so, why not go back still further and hold the real estate agent, who appointed A., and the owner, who appointed the agent, and, for that matter, the parents of A., who, being responsible for the latter's existence, are in one sense a cause? Or why stop short with them?

⁵ *Ehrgott v. Mayor, etc., of City of New York*, 96 N. Y. 264, 281, 48 Am. Rep. 622, per Earl, J.

⁶ *Hoag v. Lake Shore & M. S. R. Co.*, 85 Pa. 293, 298, 27 Am. Rep. 653, per Paxson, J.

⁷ The proximate and not the remote cause is to be considered.

⁸ "It is impossible by any general rule to draw a line between those injurious causes of damages which the law regards as sufficiently proximate and those which are too remote to be the foundation of an action." *Scott v. Hunter*, 46 Pa. 192, 195, 84 Am. Dec. 542, per Strong, J. Each case must be decided "largely upon the special facts belonging to it, and often upon the very nicest discriminations." *Louisiana Mut. Ins. Co. v. Tweed*, 7 Wall. 44, 52, 19 L. Ed. 65, per Miller, J. "The true rule is that what is the proximate cause of the injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it." *MILWAUKEE & ST. P. R. CO. v. KELLOGG*, 94 U. S. 469, 474, 24 L. Ed. 256, Chapin Cas. Torts, 31, per Strong, J.

Probably the most frequently cited statement is that of Justice Strong in *Milwaukee & St. P. R. Co. v. Kellogg*.⁹ It was there said: "The question always is: Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

Now, it will be observed that in the foregoing quotation two tests are laid down: First, whether there was a continuous succession of events; and, second, whether the injury was the natural and probable consequence which should have been foreseen. The first, while the better, is open to criticism, in that the court omitted to define the nature of the intervening cause. The second is open to the serious objection that it leads to an inference that the precise form of injury should have been foreseen, whereas it is sufficient that a reasonable man must have anticipated that some injury would have resulted, although its exact nature could not previously have been defined.¹⁰ Hence, where the latter rule has been adopted, it has often been limited by the further statement that it "is not to be understood as requiring that the particular result might have been foreseen, for if the consequences follow in unbroken sequence from the wrong to the injury without an intervening; efficient cause, it is sufficient if, at the time of the negligence, the wrongdoer might by the exercise of ordi-

⁹ *MILWAUKEE & ST. P. R. CO. v. KELLOGG*, 94 U. S. 469, 474, 24 L. Ed. 256, Chapin Cas. Torts, 31.

¹⁰ See "Torts," 38 Cyc. 444, where the author has collated many decisions.

nary care have foreseen that some injury might result from his negligence.”¹¹

From what has been said it necessarily appears that neither time nor distance is essentially a controlling element in determining whether a certain cause is the proximate cause.¹² Nor, as will be seen hereafter, is it required that the proximate cause be the sole cause.

INTERVENTION OF NATURAL FORCE

27. The sequence of events is not broken by the intervention of an act of nature occurring while the resulting operation of the wrongful act or neglect is effective.

In one of the earlier cases¹³ the defendant's vessel struck upon a shoal through the negligence of the captain and crew. It was blowing hard, all control over the ship was lost, and through the action of the wind and tide it was carried against and injured plaintiff's sea wall. Manifestly the proximate cause of the injury was the negligent grounding. Neither wind nor tide could be considered to be intervening factors

¹¹ Pullman Palace Car Co. v. Laack, 143 Ill. 242, 260, 32 N. E. 285, 18 L. R. A. 215; Louisville & J. Ferry Co. v. Nolan, 135 Ind. 60, 34 N. E. 710; Hill v. Winsor, 118 Mass. 251; Ehrgott v. Mayor, etc., of City of New York, 96 N. Y. 264, 48 Am. Rep. 622; Drum v. Miller, 135 N. C. 204, 47 S. E. 421, 65 L. R. A. 890, 102 Am. St. Rep. 528; Smith v. London, etc., R. Co., L. R. 6 C. P. 14, 40 L. J. C. P. 21, 23 L. T. Rep. N. S. 678, 19 Wkly. Rep. 230.

¹² Wills v. Ashland Light, Power & St. Ry. Co., 108 Wis. 255, 84 N. W. 998. Where a rotten stump was set on fire by the negligence of the railroad company, it was held that “the fact that the fire smouldered awhile in the stump, and, after it was supposed to have been extinguished, broke out again the next day, while it makes the conclusion less obvious that the damage was done by the same fire, does not interpose any new cause or enable the court to say as matter of law that the causal connection was broken.” Haverly v. State Line & S. R. Co., 135 Pa. 50, 58, 19 Atl. 1013, 20 Am. St. Rep. 848.

¹³ Romney Marsh v. Trinity House, L. R. 5 Exch. 204, 39 L. J. Exch. 163, 22 L. T. Rep. N. S. 446, 18 Wkly. Rep. 869, affirmed L. R. 7 Exch. 247, 41 L. J. Exch. 106, 20 Wkly. Rep. 952.

which would isolate the defendant's negligence. A similar result was reached where a ship captain negligently caused water to be pumped into a boiler in midwinter. The water froze, cracked a pipe, and escaped, damaging the cargo. It was not the frost which was the proximate cause of the loss, but the act of the captain.¹⁴ So, too, if I negligently start a fire and the wind carries the sparks, or burning oil floats down a stream to the point where damage occurs, it is evident that there has been no break in the chain of causation.¹⁵

Under this rule come cases where defendant has unlawfully caused a physical shock, resulting in functional disturbance, from which damage results. Thus, where a passenger on a railroad was thrown to the floor, cut and bruised, his mental functions subsequently becoming affected, and paralysis finally supervening, a verdict was upheld which constituted a finding that the paralysis was caused by the rupture of a blood vessel, the result of the shock and injury.¹⁶

It must be kept in mind, however, that, as already stated, the effect of the negligence or wrongful act must not have ceased to be operative when the natural cause intervened. If, therefore, a state of facts is produced which, although concededly due to the defendant's fault, did not do more than render possible the occurrence of the subsequent events, the original wrongdoing is here a condition and not a cause of the ultimate damage. To illustrate: Suppose a railroad negligently delays transportation of goods from town A. to town

¹⁴ *Slordet v. Hall*, 4 Bing. 607, 6 L. J. P. O. S. 137, 1 M. & P. 561, 29 Rev. Rep. 651, 13 E. C. L. 657.

¹⁵ *Higgins v. Dewey*, 107 Mass. 494, 9 Am. Rep. 63; *Lillibridge v. McCann*, 117 Mich. 84, 75 N. W. 288, 41 L. R. A. 381, 72 Am. St. Rep. 553; *Poeppers v. Missouri, K. & T. Ry. Co.*, 67 Mo. 715, 29 Am. Rep. 518; *Kuhn v. Jewett*, 32 N. J. Eq. 647; *Hoffman v. King*, 160 N. Y. 618, 55 N. E. 401, 46 L. R. A. 672, 73 Am. St. Rep. 715. Decisions to the contrary, such as *Hoag v. Lake Shore & M. S. R. Co.*, 85 Pa. 293, 27 Am. Rep. 653, and *Marvin v. Chicago, M. & St. P. Ry. Co.*, 79 Wis. 140, 47 N. W. 1123, 11 L. R. A. 506, are not to be commended.

¹⁶ *BISHOP v. ST. PAUL CITY RY. CO.*, 48 Minn. 26, 50 N. W. 927, Chapin Cas. Torts, 35. See, also, *Ehrgott v. Mayor, etc., of City of New York*, 96 N. Y. 264, 48 Am. Rep. 622; *Davies v. McKnight*, 146 Pa. 610, 23 Atl. 320.

C. so that they arrive at town B., an intermediate point, several days overdue, and upon arrival they are destroyed by a flood. Here the loss was not immediately due to the negligence of the railroad, for the immediate cause was the flood. Nevertheless, had proper diligence been displayed in transit, the loss would not have occurred, since the goods would not have been at B. when the flood came. But is the negligent delay the proximate cause of the loss? The better view is that it is not, as it ceased to be operative upon the arrival of the goods at B.¹⁷

FRIGHT AND MENTAL ANGUISH

28. Where the cause of action is perfect in itself, the party wronged may include in his recovery damages for mental anguish proximately resulting.

Whether mental anguish alone can be considered a proximate result, to supply the damage where damage must be proved, is in dispute.

From what has been said concerning the intervention of a natural cause, the conclusion might appear that, in all cases, mental suffering, where it exists, is to be regarded as a result of the wrongdoing. This may be true (a) in cases where a cause of action may be established without reference to the mental anguish; but (b) in other instances the courts are not in accord.

Under the first head would come a case where defendant had trespassed upon a cemetery lot owned by plaintiff and removed the body of the latter's child. Apart from the outrage to plaintiff's feelings, he would have a perfect right of

¹⁷ *Hoadley v. Northern Transportation Co.*, 115 Mass. 304, 15 Am. Rep. 106; *Denny v. New York Cent. R. Co.*, 13 Gray (Mass.) 481, 74 Am. Dec. 645; *Daniels v. Ballantine*, 23 Ohio St. 532, 13 Am. Rep. 264; *Morrison v. Davis*, 20 Pa. 171, 57 Am. Dec. 695; *Memphis & C. R. Co. v. Reeves*, 10 Wall. 176, 19 L. Ed. 909. But New York has adopted the opposite view. *Read v. Spaulding*, 30 N. Y. 630, 86 Am. Dec. 426, where it was held that the delay was equivalent to deviation and made the carrier an insurer.

action for the trespass, and having it he may recover in the same action for his mental pain.¹⁸ In such torts as assault and battery,¹⁹ false imprisonment,²⁰ false arrest,²¹ malicious prosecution,²² seduction,²³ and in defamation, where damage is presumed or proved,²⁴ the principle has full play. This is likewise true of breach of promise to marry, which, although nominally an action on contract, is in many respects regarded as really in tort.²⁵ }

Now, for the second class of cases, of which defamation and negligence probably furnish the best illustrations. If I publish a statement concerning A. of so grave a character that it will be said to be defamatory per se,²⁶ and from which damage will be inferred, as if I call him a murderer, or if the charge is not of this type, yet special damage cognizable

¹⁸ *Meagher v. Driscoll*, 99 Mass. 281, 96 Am. Dec. 759. To the same effect, *HICKEY v. WELCH*, 91 Mo. App. 4, Chapin Cas. Torts, 39 (trespass). In *Larson v. Chase*, 47 Minn. 307, 50 N. W. 238, 14 L. R. A. 85, 28 Am. St. Rep. 370, a right of action for mental anguish caused by the dissection of the body of plaintiff's husband was recognized, though there was no trespass.

¹⁹ *Kline v. Kline*, 158 Ind. 602, 64 N. E. 9, 58 L. R. A. 397; *Burns v. Jones*, 211 Mass. 475, 98 N. E. 29; *Morgan v. Curley*, 142 Mass. 107, 7 N. E. 726; *Wadsworth v. Treat*, 43 Me. 163; *Hamilton v. Third Ave. R. Co.*, 53 N. Y. 25; *Williams v. Underhill*, 63 App. Div. 223, 71 N. Y. Supp. 291; *Craker v. Chicago & N. W. R. Co.*, 36 Wis. 657, 17 Am. Rep. 504.

²⁰ *Harness v. Steele*, 159 Ind. 286, 64 N. E. 875.

²¹ *Young v. Gormley*, 120 Iowa, 372, 94 N. W. 922.

²² *Hamilton v. Smith*, 39 Mich. 222.

²³ *Phillips v. Hoyle*, 4 Gray (Mass.) 568; *Phelin v. Kenderdine*, 20 Pa. 354.

²⁴ See *infra*, pp. 304, 314; *Finger v. Pollack*, 188 Mass. 208, 74 N. E. 317; *Cribbs v. Yore*, 119 Mich. 237, 77 N. W. 927; *Knowlden v. Guardian Printing & Publishing Co.*, 69 N. J. Law, 670, 55 Atl. 287; *Van Ingen v. Star Co.*, 1 App. Div. 429, 37 N. Y. Supp. 114, affirmed 157 N. Y. 695, 51 N. E. 1094; *Hacker v. Heiney*, 111 Wis. 317, 87 N. W. 249. Recovery for physical sickness, the result of mental distress, allowed in *Garrison v. Sun P. & P. Ass'n*, 207 N. Y. 1, 100 N. E. 430, 45 L. R. A. (N. S.) 766, Ann. Cas. 1914C, 288; denied in *Butler v. Hoboken P. & P. Co.*, 73 N. J. Law, 45, 62 Atl. 272.

²⁵ *Tobin v. Shaw*, 45 Me. 331, 71 Am. Dec. 547; *Grant v. Willey*, 101 Mass. 356; *Allen v. Baker*, 86 N. C. 91, 41 Am. Rep. 444.

²⁶ See *infra*, pp. 304, 314.

at law flows from it, then, as has been seen, the defamed party may recover for the humiliation he may have experienced. But if the words are not defamatory per se, and the only damage is the mental damage, there will be no cause of action.²⁷ Plaintiff's mental anguish alone will not, for instance, sustain an action for a slander or libel upon a deceased relative.²⁸

When we come to negligence, we find the leading case of *Mitchell v. Rochester Ry. Co.*²⁹ Plaintiff, a pregnant woman, was standing on a crosswalk. Defendant's horses were negligently driven so close to her that she stood between their heads when they were stopped. From fright, she became unconscious, and the result was a miscarriage. Now, if there had been any impact, any immediate physical injury, however slight, another question would have been presented. There having been none, it was held that there could be no recovery.³⁰

Courts which have adopted this view base their conclusion on one or both of the following grounds: First, that defendant cannot be said to have anticipated the injury, which was therefore not proximate; second, that to permit recovery would be to admit a flood of litigation of such a character that injuries might be feigned without possibility of detection, the

²⁷ So held of a charge of unchastity in *Terwilliger v. Wands*, 17 N. Y. 54, 72 Am. Dec. 420; *Allsop v. Allsop*, 5 H. & N. 534, 6 Jur. N. S. 433, 29 L. J. Exch. 315, 2 L. T. Rep. N. S. 290, 8 Wkly. Rep. 449. But see *infra*, pp. 313, 316.

²⁸ *Bradt v. New Nonpareil Co.*, 108 Iowa, 449, 79 N. W. 122, 45 L. R. A. 681; *Sorenson v. Balaban*, 11 App. Div. 164, 42 N. Y. Supp. 654.

²⁹ *MITCHELL v. ROCHESTER RY. CO.*, 151 N. Y. 107, 45 N. E. 354, 34 L. R. A. 781, 56 Am. St. Rep. 604, Chapin Cas. Torts, 37.

³⁰ To the same effect, see *Braun v. Craven*, 175 Ill. 401, 51 N. E. 657, 42 L. R. A. 199; *Atchison, T. & S. F. R. Co. v. McGinnis*, 46 Kan. 109, 26 Pac. 453; *Smith v. Postal Tel. Cable Co.*, 174 Mass. 576, 55 N. E. 380, 47 L. R. A. 323, 75 Am. St. Rep. 374; *Huston v. Freemansburg Borough*, 212 Pa. 548, 61 Atl. 1022, 3 L. R. A. (N. S.) 49; *Victorian Ry. Com'rs v. Coultas*, 13 App. Cas. 222, 52 J. P. 500, 57 L. J. P. C. 69, 58 L. T. Rep. N. S. 390, 57 Wkly. Rep. 129. See *Homans v. Boston El. Ry. Co.*, 180 Mass. 456, 62 N. E. 737, 57 L. R. A. 291, 91 Am. St. Rep. 324, where there was physical impact.

damages for which would rest upon mere conjecture.³¹ Though the doctrine has been subjected to some criticism,³² and has not met with universal acceptance, the weight of authority is in its favor.³³

³¹ Argument is scarcely necessary to show the unfortunate effect of these decisions. The first objection can be met by saying that it is an improper application of the test of remoteness. In many of the cases, where plaintiff has not been permitted to recover, injury, although not in its precise form, could have been anticipated. It is thoroughly established by modern science that physical disorder may be the direct consequence of nervous shock. To the second objection it may be answered that public policy is invoked for a purpose wholly at variance with the reasons on which it is founded. For courts to deny justice, because of the difficulty of administering it, amounts to self-stultification. The inconsistency is apparent when we consider that no difficulty has been experienced in cases where damages are "at large," and even mental anguish has been considered a proper ground for damages where an independent cause of action has been found to exist. In reality, it is merely an arbitrary rule. 38 Cyc. 450, note 2. When we contrast the conclusion reached by the New York Court of Appeals in the *MITCHELL CASE*, 151 N. Y. 107, 45 N. E. 354, 34 L. R. A. 781, 56 Am. St. Rep. 604, Chapin Cas. Torts, 37, with that in *Gillespie v. Brooklyn Heights R. Co.*, 178 N. Y. 347, 70 N. E. 857, 66 L. R. A. 618, 102 Am. St. Rep. 503, its peculiarity becomes apparent.

³² "Why is the accompaniment of physical injury essential? For my own part I should not like to assume it to be scientifically true that a nervous shock which causes serious bodily illness is not ac-

³³ See cases cited in note 30, *supra*. Where plaintiff, with her husband, went to the woman's waiting room of defendant's railroad depot to await the arrival of her sister, and defendant's employé ordered the husband to leave, using abusive language, whereupon plaintiff suffered a nervous shock and became ill, held that, as the language was not addressed to plaintiff, nor any physical injury inflicted upon her, there might be no recovery. *Bucknam v. Great Northern R. Co.*, 76 Minn. 373, 79 N. W. 98. To the same effect *Nelson v. Crawford*, 122 Mich. 466, 81 N. W. 335, 80 Am. St. Rep. 577, where defendant dressed himself in woman's clothes and went to the house of plaintiff, who became frightened at his appearance and six weeks later sustained a miscarriage; also *Taft v. Taft*, 40 Vt. 229, 94 Am. Dec. 389, where defendant sent an anonymous threatening letter, with the design of annoying plaintiff and frightening him out of town. See "Fright as an Element of Recoverable Damages," 77 Am. St. Rep. 859, note; "Recovery for Damage Resulting from Nervous Shock," 15 Harv. Law Rev. 304.

An important application has been made in cases of the negligent transmission of telegrams. In *So Relle v. Western Union Tel. Co.*,⁸⁴ decided in 1881, the Supreme Court of Texas took the view that damages for mental suffering might be recovered when sustained through failure to deliver or delay in delivering a telegram advising the addressee of the death of a near relative, provided it appeared from the face of the telegram that mental anguish would naturally result from such failure or delay. This doctrine has been followed in a few jurisdictions with varying degrees of liberality, some applying it only to cases of illness or death,⁸⁵ and others allowing recovery where the message related merely to social

tually accompanied by physical injury, although it may be impossible, or at least difficult, to detect the injury at the time in the living subject. I should not be surprised if the surgeon or the physiologist told us that nervous shock is or may be in itself an injurious affection of the physical organism. Let it be assumed, however, that the physical injury follows the shock, but that the jury are satisfied upon proper and sufficient medical evidence that it follows the shock as its direct and natural effect, is there any legal reason for saying that the damage is less proximate in the legal sense than damage which arises contemporaneously? 'As well might it be said' (I am quoting from the judgment of Palles, C. B., *Bell v. Great Northern R. Co.*, L. R. 26 Ir. 432, 439) 'that a death caused by poison is not to be attributed to the person who administered it, because the mortal effect is not produced contemporaneously with its administration.' Remoteness as a legal ground for the exclusion of damage in an action of tort means, not severance in point of time, but the absence of direct and natural causal sequence—the inability to trace in regard to the damage the 'propter hoc' in a necessary or natural descent from the wrongful act. As a matter of experience, I should say that the injury to health which forms the main ground of damages in actions of negligence, either in cases of railway accidents or in running-down cases, frequently is proved, not as a concomitant of the occurrence, but as one of the sequelæ." *Dulieu v. White*, [1901] 2 K. B. 669, 677, 70 L. J. K. B. 837, 85 L. T. Rep. N. S. 126, 50 Wkly. Rep. 76, per Kennedy, J. And see *Watson v. Dilts*, 116 Iowa, 249, 89 N. W. 1068, 57 L. R. A. 559, 93 Am. St. Rep. 239. *Spearman v. McCrary*, 4 Ala. App. 473, 58 South. 927; *HICKEY v. WELCH*, 91 Mo. App. 4, Chaplin Cas. Torts, 39.

⁸⁴ 55 Tex. 308, 40 Am. Rep. 805.

⁸⁵ *Western Union Tel. Co. v. Westmoreland*, 151 Ala. 319, 44 South. 382; *Western Union Tel. Co. v. McCaul*, 115 Tenn. 99, 90 S. W. 856.

matters, as an appointment to meet on the arrival of a train.⁸⁶ But the Texas view has been repudiated by a majority of the courts.⁸⁷

It may also be added that a distinction has been recognized by some of the courts, which generally refuse to consider mental anguish, standing by itself, as sufficient, but which make an exception in cases where the defendant has been guilty of a willful wrong as distinguished from negligence.⁸⁸

INTERVENTION OF VOLUNTARY ACT OR NEGLECT

29. Intervention of a voluntary act or neglect will break the chain of causation, unless it should have been foreseen by the wrongdoer.

Unforeseeable Intervention

It is evident that where a voluntary agent has interposed between the wrong and the damage, the law can go no further. The intervening factor must necessarily be regarded as the proximate cause. For example, I slander A. in a conversation with B., or send to B. a libelous letter concerning A. These are acts for which A. may hold me responsible. But, generally speaking, I will not be liable for any repetition by

⁸⁶ *Green v. Western Union Tel. Co.*, 136 N. C. 489, 49 S. E. 165, 67 L. R. A. 985, 103 Am. St. Rep. 955, 1 Ann. Cas. 349; *Postal Tel. Cable Co. v. Terrill*, 124 Ky. 822, 100 S. W. 292, 14 L. R. A. (N. S.) 927.

⁸⁷ *Francis v. Western Union Tel. Co.*, 58 Minn. 252, 59 N. W. 1078, 25 L. R. A. 406, 49 Am. St. Rep. 507; *Connell v. Western Union Tel. Co.*, 116 Mo. 34, 22 S. W. 345, 20 L. R. A. 172, 38 Am. St. Rep. 575; *Curtin v. Western Union Tel. Co.*, 13 App. Div. 253, 42 N. Y. Supp. 1109; *Morton v. Western Union Tel. Co.*, 53 Ohio St. 431, 41 N. E. 689, 32 L. R. A. 735, 53 Am. St. Rep. 648; *Connelly v. Western Union Tel. Co.*, 100 Va. 51, 40 S. E. 618, 56 L. R. A. 663, 93 Am. St. Rep. 919.

⁸⁸ *Williams v. Underhill*, 63 App. Div. 223, 226, 71 N. Y. Supp. 291; *HICKEY v. WELCH*, 91 Mo. App. 4, *Chapin Cas. Torts*, 39; *Kline v. Kline*, 158 Ind. 602, 64 N. E. 9, 58 L. R. A. 397. In *Wilkinson v. Downton*, [1897] 2 Q. B. 57, 66 L. J. Q. B. 493, 76 L. T. Rep. N. S. 493, 45 Wkly. Rep. 525, defendant, intending to play a practical joke,

B., for this is his voluntary act.³⁹ So, where defendant negligently permits a pit to remain open in the highway, it is not liable to a constable thrown into it by a prisoner escaping from custody, since here "the person so intervening acts as a nonconductor, and insulates" the negligence of the defendant from the injury suffered by the plaintiff.⁴⁰

In the foregoing cases the intervention was by a stranger; but the rule is, of course, the same where the injured party has himself interposed, as where plaintiff shot at a knothole in the wall of defendant's wooden building, containing dynamite, and thus caused an explosion,⁴¹ or has committed suicide in a fit of insanity caused by a wreck on defendant's road.⁴² The principle also holds good where there is no intervening act, but a mere omission to perform a duty recognized by law, as where plaintiff has improperly failed to exercise care to lessen the damage; for example, being aware that a fire upon adjoining property is likely to spread to his own, he omits to take reasonable precautions to prevent it from spreading,⁴³ or, knowing of the unlawful removal of his fence, he neglects

falsely stated to plaintiff that the latter's husband had met with a serious accident, by which both of his legs were broken. Plaintiff was permitted to recover for a violent nervous shock, which rendered her ill. *Contra*, *St. Louis, I. M. & S. Ry. Co. v. Taylor*, 84 Ark. 42, 104 S. W. 551, 13 L. R. A. (N. S.) 159.

³⁹ *Elmer v. Fessenden*, 151 Mass. 359, 24 N. E. 208, 5 L. R. A. 724; *Hastings v. Stetson*, 126 Mass. 329, 30 Am. Rep. 683; *Terwilliger v. Wands*, 17 N. Y. 54, 72 Am. Dec. 420; *Ward v. Weeks*, 7 Bing. 211, 4 M. & P. 796.

⁴⁰ *ALEXANDER v. TOWN OF NEW CASTLE*, 115 Ind. 51, 17 N. E. 200, *Chapin Cas. Torts*, 44. For illustrations showing a voluntary unforeseeable intervention, see *Kleebauer v. Western Fuse & Explosives Co.*, 138 Cal. 497, 71 Pac. 617, 60 L. R. A. 377, 94 Am. St. Rep. 62; *Booth v. Sanford*, 52 Conn. 481; *Tutein v. Hurley*, 98 Mass. 211, 93 Am. Dec. 154; *Leeds v. New York Tel. Co.*, 178 N. Y. 118, 70 N. E. 219; *Vickers v. Wilcocks*, 8 East, 1, 103 Eng. Repr. 244.

⁴¹ *McGhee v. Norfolk & S. R. Co.*, 147 N. C. 142, 60 S. E. 912, 24 L. R. A. (N. S.) 119.

⁴² *Scheffer v. Washington City, V. M. & G. S. R. Co.*, 105 U. S. 249, 26 L. Ed. 1070.

⁴³ *Haverly v. State Line & S. R. Co.*, 135 Pa. 50, 19 Atl. 1013, 20 Am. St. Rep. 848.

to repair, and cattle enter and eat the crops,⁴⁴ or, having received personal injuries, he unreasonably fails to consult a physician or to follow the latter's advice.⁴⁵

Foreseeable Intervention

To the rule that the voluntary intervention of a responsible individual will exonerate a preceding wrongdoer we must note an exception in cases where "it was the duty of the original wrongdoer to anticipate and provide against such intervention, because such intervention was a thing likely to happen in the ordinary course of events."⁴⁶ Thus, as has been seen, while the original defamer is not ordinarily liable for the repetition of his words, he will be responsible if their first utterance was under such circumstances that the repetition was reasonably to be foreseen.⁴⁷ So, where defendant left a horse and cart standing in the street, with no one to watch, he was held liable for the damage done by them, although occasioned by the act of a passer-by, who struck the horse;⁴⁸ and a similar result was reached where defendant's servants negligently left a signal torpedo on its railroad track, and a boy picked it up and in playing with it caused it to explode and injure plaintiff, another boy.⁴⁹

Such a case was *Clark v. Chambers*,⁵⁰ where defendant had unlawfully placed a barrier set with spikes across a private

⁴⁴ He can, of course, recover for the original removal, though not for the value of the crops. *Loker v. Damon*, 17 Pick. (Mass.) 284.

⁴⁵ His own negligence is the proximate cause of such consequences as are found to be the reasonable result of his failure. *Schmidt v. Mitchell*, 84 Ill. 195, 25 Am. Rep. 446; *Sullivan v. Tioga R. Co.*, 112 N. Y. 643, 20 N. E. 569, 8 Am. St. Rep. 793; *Sauter v. New York Cent. & H. R. R. Co.*, 66 N. Y. 50, 23 Am. Rep. 18. And see *infra*, p. 539.

⁴⁶ *Stone v. Boston & A. R. Co.*, 171 Mass. 536, 540, 51 N. E. 1, 41 L. R. A. 794, per Allen, J.

⁴⁷ *Zier v. Hoffin*, 33 Minn. 66, 21 N. W. 862, 53 Am. Rep. 9; *Allen v. Wortham*, 89 Ky. 485, 13 S. W. 73; *State v. Lund*, 80 Kan. 240, 101 Pac. 1000. See *infra*, p. 299.

⁴⁸ *Illidge v. Goodwin*, 5 C. & P. 190, 24 E. C. L. 520.

⁴⁹ *Harriman v. Pittsburg, C. & St. L. Ry. Co.*, 45 Ohio St. 11, 12 N. E. 451, 4 Am. St. Rep. 507.

⁵⁰ *Clark v. Chambers*, 3 Q. B. D. 327, 47 L. J. Q. B. 427, 38 L. T. Rep. N. S. 454, 26 Wkly. Rep. 613.

road and a third party removed it, setting it across an adjoining footpath. On a dark night plaintiff, walking along the footpath, encountered the barrier and was injured. The injury was held the proximate result of defendant's act.⁵¹

Involuntary Intervention

Furthermore, in order that it should be regarded as the proximate cause, the intervening act either of the injured party or of some third person should be voluntary, in the sense that it was the offspring of a mind free to choose. An involuntary act, giving to the term its enlarged meaning, will be placed in the same category as a natural force and the sequence will be preserved.⁵²

An illustration frequently found is where a reasonable apprehension of peril has been created by defendant's wrong, and injury results from an endeavor to escape. Such a situation may assume a variety of forms. For instance, danger

⁵¹ "A man who unlawfully places an obstruction across either a public or private way may anticipate the removal of the obstruction by some one entitled to use the way as a thing likely to happen; and if this should be done the probability is that the obstruction so removed will, instead of being carried away altogether, be placed somewhere near." *Clark v. Chambers*, 3 Q. B. D. 327, 338, *supra*, per Cockburn, J. For further illustrations, see *LANE v. ATLANTIC WORKS*, 111 Mass. 136, *Chapin Cas. Torts*, 45; *Cohen v. Mayor, etc., of City of New York*, 113 N. Y. 532, 21 N. E. 700, 4 L. R. A. 406, 10 Am. St. Rep. 506; *Welck v. Lander*, 75 Ill. 93; *Smith v. New York, S. & W. R. Co.*, 46 N. J. Law, 7; *Fishburn v. Burlington & N. R. Co.*, 127 Iowa, 483, 103 N. W. 481. But where a railroad company negligently allows its platform to become saturated with oil, and a careless teamster drops a lighted match, the result being the destruction of plaintiff's buildings, the company was held not to be liable, since the act of the teamster was not reasonably to have been anticipated. *Stone v. Boston & A. R. Co.*, 171 Mass. 536, 51 N. E. 1, 41 L. R. A. 794.

⁵² Thus, where a passenger has been forced unlawfully to alight from a car and walk to his destination, injuries not attributable to his negligence and suffered by reason of the walk are deemed the proximate results of the expulsion. *East Tennessee, V. & G. R. Co. v. Lockhart*, 79 Ala. 315; *Terre Haute & I. R. Co. v. Buck*, 96 Ind. 346, 49 Am. Rep. 168; *Cincinnati, H. & I. R. Co. v. Eaton*, 94 Ind. 474, 48 Am. Rep. 179; *Gulf, C. & S. F. Ry. Co. v. Green* (Tex. Civ. App.) 141 S. W. 341.

may threaten the active and injured party. If the latter's actions induced by the apprehended peril measure up to the legal standard of what a man of ordinary prudence would have done under similar circumstances, there will be no such contributory negligence as will prevent a recovery, as where a pedestrian, for the purpose of avoiding a recklessly driven horse, sprang sidewise and struck his head against the wall of a building,⁵³ or a passenger reasonably believing himself to be in danger from a threatened collision leaped from the train and was injured.⁵⁴

Then, again, the peril may threaten a third party, and (a) the active and injured party has received his injuries while engaged in the work of rescue, where his conduct, bearing in mind the attendant circumstances requiring an instant decision, has not amounted to rashness in the judgment of a man of ordinary prudence;⁵⁵ or (b) the injured party is pas-

⁵³ *Coulter v. American Merchants' Union Exp. Co.*, 56 N. Y. 585. For further illustrations, see *Tuttle v. Atlantic City R. Co.*, 66 N. J. Law, 327, 49 Atl. 450, 54 L. R. A. 582, 88 Am. St. Rep. 491; *Illinois Cent. R. Co. v. Anderson*, 184 Ill. 294, 56 N. E. 331; *Pennsylvania R. Co. v. Snyder*, 55 Ohio St. 342, 45 N. E. 559, 60 Am. St. Rep. 700.

⁵⁴ *Cody v. New York & N. E. R. Co.*, 151 Mass. 462, 24 N. E. 402, 7 L. R. A. 843; *Estes v. Missouri Pac. R. Co.*, 110 Mo. App. 725, 85 S. W. 627; *Buel v. New York Cent. R. Co.*, 31 N. Y. 314, 88 Am. Dec. 271; *Willis v. Second Ave. Traction Co.*, 189 Pa. 430, 42 Atl. 1; *Jones v. Boyce*, 1 Stark. 493, 18 Rev. Rep. 812, 2 E. C. L. 189.

⁵⁵ Where defendant negligently permitted an opening in the railing of a bridge over a canal to remain unguarded, it was held liable for the death of a father, drowned while endeavoring to save his son, who had fallen through the opening. *Gibney v. State*, 137 N. Y. 1, 33 N. E. 142, 19 L. R. A. 365, 33 Am. St. Rep. 690. In this case the negligence consisted of an omission; that is, a failure originally to construct the bridge properly or permitting it to become dangerous. But the result is the same where the negligence is active, as where a railroad train is driven at a dangerous speed and a person is killed while endeavoring to rescue a child. *ECKERT v. LONG ISLAND R. CO.*, 43 N. Y. 502, 3 Am. Rep. 721, *Chapin Cas. Torts*, 49. To the same effect, *Louisville & N. R. Co. v. Orr*, 121 Ala. 489, 26 South. 35; *Mobile & O. R. Co. v. Ridley*, 114 Tenn. 727, 86 S. W. 606, 4 Ann. Cas. 925; *Corbin v. City of Philadelphia*, 195 Pa. 461, 45 Atl. 1070, 49 L. R. A. 715, 78 Am. St. Rep. 825;

sive, and has been harmed through the acts of the threatened individual committed while endeavoring to escape from the peril created by the negligence or wrongful act of the defendant;⁵⁶ or (c) the injured party is passive, and a third person has caused the harm while engaged in the work of rescue. Such was the case where defendant descended in a balloon in the plaintiff's garden. His body was hanging out of the car in a very perilous situation, and a crowd broke into the garden for the purpose of rescuing him, and trampled down plaintiff's vegetables and flowers. Defendant having put himself in the position of inviting help, he was properly held responsible for the acts of those who had responded.⁵⁷

INTERVENTION OF IRRESPONSIBLE INDIVIDUAL OR UNCONSCIOUS INSTRUMENT

30. Liability will continue where there intervenes the act of an irresponsible person, or the injury is directly caused by an unconscious instrument set in motion or made effective by the wrongdoer.

Intervention by Irresponsible Individual

The rule that the intervention of an irresponsible individual or an unconscious instrument will not break the chain of caus-

Saylor v. Parsons, 122 Iowa, 679, 98 N. W. 500, 64 L. R. A. 542, 101 Am. St. Rep. 283.

⁵⁶ As in the leading case of *Scott v. Shepherd*, W. Bl. 892, 96 Eng. Repr. 525, 3 Wils. C. P. 403, 95 Eng. Repr. 1124. Here defendant threw a lighted squib into a market house. It fell upon the standing of Y. W., to prevent injury to himself and to the goods of Y., threw it across the market house, and it fell upon the standing of R., who in turn, to save himself, threw it to another part of the building, where it struck the plaintiff. While the question directly involved here was whether the remedy was in trespass or case, the decision in favor of the former has caused it to be cited as a leading authority in favor of the proposition laid down in the text. To the same effect, *Ricker v. Freeman*, 50 N. H. 420, 9 Am. Rep. 267; *Lowery v. Manhattan R. Co.*, 99 N. Y. 158, 1 N. E. 608, 52 Am. Rep. 12; *Vandenburgh v. Truax*, 4 Denio (N. Y.) 464, 47 Am. Dec. 268; *Chambers v. Carroll*, 199 Pa. 371, 49 Atl. 128.

⁵⁷ *Gulle v. Swan*, 19 Johns. (N. Y.) 381, 10 Am. Dec. 234.

ation rests largely upon the principle just laid down, which makes the wrongdoer responsible where such intervention was to have been foreseen. The word "irresponsible" is here used both in a legal sense, as meaning one who will not be held accountable, and in a popular sense, as one who is unconscious of the existence of the state of facts created by defendant's wrongdoing. In neither instance can the final injury be regarded as due to the intermediary. As examples of the first there are the cases where defendant has negligently created a dangerous situation and the immediate injury has been produced to and by a child, who, although exercising the degree of care to be expected of one of his age and discretion, has nevertheless been guilty of what would be contributory negligence in an adult, or who is of such tender years that he will be termed "non sui juris," and cannot, therefore, be deemed guilty of contributory negligence at all. Such a case was *Lynch v. Nurdin*,⁵⁸ where, defendant having negligently left his horse and cart unattended in the street, plaintiff, a child of between six and seven, got upon the cart and was injured.⁵⁹

On the theory that the intermediary was irresponsible in the sense of unknowing, it has been held that one who delivers to a carrier a dangerous article, not informing him at the time of its nature, will be liable for an injury to a third party occurring during transit, though the act of the carrier may be the immediately productive cause.⁶⁰ Again, where a wholesale dealer sells to a retailer an article rendered inherently dangerous by act of the vendor, the dangerous quality being secret and undisclosed, and the retailer in good faith sells to a customer, who is injured, the resale is deemed so far an involuntary act that the liability of the wholesaler will con-

⁵⁸ 1 Q. B. 29, 5 Jur. 797, 10 L. J. Q. B. 73, 4 P. & D. 672, 41 E. C. L. 422, 113 Eng. Repr. 1041.

⁵⁹ And see *Ihl v. Forty-second St. & G. St. Ferry R. Co.*, 47 N. Y. 317, 7 Am. Rep. 450. For contributory negligence of infants see *infra*, p. 547.

⁶⁰ *Farrant v. Barnes*, 11 C. B. N. S. 553, 8 Jur. N. S. 868, 31 L. J. C. P. 137, 103 E. C. L. 553; *Boston & A. R. Co. v. Shanly*, 107 Mass. 568. And see the *Nitro-Glycerine Case*, 15 Wall. 524, 21 L. Ed. 206.

tinue unbroken. This doctrine, while often applied where a noxious drug is sold as harmless, and the retail druggist has in turn sold it to a customer without knowledge of its dangerous quality,⁶¹ or where the drug is purchased by one to administer to another,⁶² is by no means restricted to medicines.⁶³ If, however, the intervening purchaser was aware of the defect, his act in supplying the injured party with the goods would break the causal connection.⁶⁴

Intervention of Unconscious Instrument

If the wrongdoer has set in motion an unconscious instrument, and the original force imparted to it has not spent itself at the time of the injury, or if the instrument has been made effective by his negligence, which continued to be operative at the time the injury occurred, responsibility as in the case of the intervention by an irresponsible individual will remain existent. Thus one who unlawfully frightens a horse, causing it to run away and inflict injury upon a third party, will be liable to the latter;⁶⁵ and where a cow, thrown by an engine, struck the ground, bounced, and fell against plaintiff, it was held that the bounce and fall of the cow was not so far

⁶¹ *Blood Balm Co. v. Cooper*, 83 Ga. 457, 10 S. E. 118, 5 L. R. A. 612, 20 Am. St. Rep. 324; *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455.

⁶² *Norton v. Sewall*, 106 Mass. 143, 8 Am. St. Rep. 298; *George v. Skivington*, L. R. 5 Exch. 1, 39 L. J. Exch. 8, 21 L. T. Rep. N. S. 495, 18 Wkly. Rep. 118.

⁶³ *Lewis v. Terry*, 111 Cal. 39, 43 Pac. 398, 31 L. R. A. 220, 52 Am. St. Rep. 146 (folding bed); *Bishop v. Weber*, 139 Mass. 411, 1 N. E. 154, 52 Am. Rep. 715 (food); *Schubert v. J. R. Clark Co.*, 49 Minn. 331, 51 N. W. 1103, 15 L. R. A. 818, 32 Am. St. Rep. 559 (ladder); *Kuelling v. Roderick Lean Mfg. Co.*, 183 N. Y. 78, 75 N. E. 1098, 2 L. R. A. (N. S.) 303, 111 Am. St. Rep. 691, 5 Ann. Cas. 124 (land roller); *Huset v. J. I. Case Threshing Mach. Co.*, 120 Fed. 865, 57 C. C. A. 237, 61 L. R. A. 303 (threshing machine). And see *infra*, p. 517 et seq.

⁶⁴ *Lewis v. Terry*, 111 Cal. 39, 43 Pac. 398, 31 L. R. A. 220, 52 Am. St. Rep. 146.

⁶⁵ *Billman v. Indianapolis, C. & L. R. Co.*, 76 Ind. 166, 40 Am. Rep. 230; *Stephenson v. Corder*, 71 Kan. 475, 80 Pac. 938, 69 L. R. A. 246, 114 Am. St. Rep. 500; *McDonald v. Snelling*, 14 Allen (Mass.) 290, 92 Am. Dec. 768; *Forney v. Geldmacher*, 75 Mo. 113, 42 Am. Rep. 388; *Willis v. Providence Telegram Pub. Co.*, 20 R. I. 285, 38 Atl. 947.

the proximate cause of the injury as to isolate the negligence of the engineer.⁶⁶ Again, where a passenger on defendant's train is jolted to the track through the negligence of the engineer, and while lying there is run over and killed by an engine belonging to another railroad, the negligence of the defendant was held to have made effective the immediate cause of the death, which did not operate as an intervening cause.⁶⁷ So, too, where defendant's locomotive set fire to a fence, which was burned, and cattle got into plaintiff's field and damaged the crop, the burning of the fence is to be regarded as the proximate cause.⁶⁸

ARBITRARY RULE IN CERTAIN CASES OF FIRE

31. An arbitrary rule has been adopted by some of the states in cases of fires due to negligence, and a point has been established at which defendant's liability will cease, though logically the injury is the proximate result.

If through my negligence a fire consume the house of A., I am, of course, responsible. If, however, the fire communicate from the house of A. to that of B., which is destroyed, am I liable for the latter's loss? And if it spread thence to the house of C., and thence to the house of D., and thence consecutively to every house, until it reach and consume the house of Z., will I be liable for the damage sustained by these twenty-four sufferers? This was the proposition put by the New York Court of Appeals in *Ryan v. New York Cent. R. Co.*⁶⁹ Here defendant by careless management had set fire to its woodshed. The fire spread to plaintiff's house, situated at a distance of 130 feet from the shed, and to a number of other

⁶⁶ *Alabama Great Southern R. Co. v. Chapman*, 80 Ala. 615, 2 South. 738. And see *Hammill v. Pennsylvania R. Co.*, 56 N. J. Law, 370, 29 Atl. 151, 24 L. R. A. 531.

⁶⁷ *Southern R. Co. v. Webb*, 116 Ga. 152, 42 S. E. 395, 59 L. R. A. 109.

⁶⁸ *Miller v. St. Louis, I. M. & S. Ry. Co.*, 90 Mo. 389, 2 S. W. 439.

⁶⁹ 35 N. Y. 210, 91 Am. Dec. 49.

buildings. In holding plaintiff's damage too remote, the court bases its conclusion in part upon the fact "that a building upon which sparks and cinders fall should be destroyed or seriously injured must be expected, but that the fire should spread and other buildings be consumed is not a necessary or a usual result," since the result depends, "not upon any necessity of a further communication of the fire, but upon a concurrence of accidental circumstances, such as the degree of the heat, the state of the atmosphere, the condition of the materials of the adjoining structure, and the direction of the wind." In other words, the damages are not foreseeable. The decision appears, however, to be based really upon public policy; for, as the court viewed it, it would be unjust to hold the original wrongdoer responsible.⁷⁰

The unfairness of such a doctrine seems manifest. It may be true, as the court states, that to hold the original wrongdoer liable under such conditions "would be to award a punishment quite beyond the offense committed." But the answer is that in a tort action punishment is not sought, but compensation. It may likewise be true, as stated in a subsequent decision, that "fires often occur from the trivial acts of most prudent persons. * * * No person, however cautious, is exempt. Misfortune may overtake him in a forgetful moment, or through fault in the members of his family or servants."⁷¹ But how about the man whose house was burned?

⁷⁰ "Nearly all fires are caused by negligence, in its extended sense. In a country where wood, coal, gas, and oils are universally used, where men are crowded into cities and villages, where servants are employed, and where children find their home in all houses, it is impossible that the most vigilant prudence should guard against the occurrence of accidental or negligent fires. A man may insure his own house, or his own furniture; but he cannot insure his neighbor's building or furniture, for the reason that he has no interest in them. To hold that the owner must not only meet his own loss by fire, but that he must guaranty the security of his neighbors on both sides, and to an unlimited extent, would be to create a liability which would be the destruction of all civilized society. No community could long exist under the operation of such a principle." *Ryan v. New York Cent. R. Co.*, 35 N. Y. 210, 216, 91 Am. Dec. 49, per Hunt, J.

⁷¹ *Hoffman v. King*, 160 N. Y. 618, 628, 55 N. E. 401, 46 L. R. A. 672, 73 Am. St. Rep. 715, per Haight, J.

Why should the wrongdoer be favored at his expense? It seems better to say that the individual by whose neglect the injury was brought about should bear the loss. Although the New York courts have in terms adhered to this doctrine,⁷² the tendency has been towards limiting it, and it has been said that the Ryan Case "should not be extended beyond the precise facts which appear therein."⁷³ It would not, for instance, apply where a railroad has negligently permitted combustible material to accumulate along its right of way, by means of which fire is communicated from a burning tie, and from whence it spreads to a fence and on to plaintiff's woodland, for here the tort consists in permitting the inflammable matter to accumulate at a place where it was likely to cause damage.⁷⁴

The New York doctrine is generally regarded with strong disapproval,⁷⁵ although it has in one instance been followed by the Supreme Court of Pennsylvania.⁷⁶

⁷² Van Inwegen v. Port Jervis, M. & N. Y. R. Co., 165 N. Y. 625, 58 N. E. 878; Hoffman v. King, 160 N. Y. 618, 55 N. E. 401, 46 L. R. A. 672, 73 Am. St. Rep. 715; Frace v. New York, L. E. & W. R. Co., 143 N. Y. 182, 38 N. E. 102; Read v. Nichols, 118 N. Y. 224, 23 N. E. 468, 7 L. R. A. 130.

⁷³ Frace v. New York, L. E. & W. R. Co., 143 N. Y. 182, 189, 38 N. E. 102, per Peckham, J.

⁷⁴ Webb v. Rome, W. & O. R. Co., 49 N. Y. 420, 10 Am. Rep. 389. To the same effect, see Fent v. Toledo, P. & W. Ry. Co., 59 Ill. 362, 14 Am. Rep. 13; Delaware, L. & W. R. Co. v. Salmon, 39 N. J. Law, 299, 23 Am. Rep. 214; Smith v. London & S. W. R. Co., 6 L. R. C. P. 14, 5 L. R. C. P. 98.

In O'Neill v. New York, O. & W. Ry. Co., 115 N. Y. 579, 22 N. E.

⁷⁵ Martin v. New York & N. E. R. Co., 62 Conn. 331, 25 Atl. 239; Fent v. Toledo, P. & W. Ry. Co., 59 Ill. 362, 14 Am. Rep. 13; Louisville, N. A. & C. Ry. Co. v. Nitsche, 126 Ind. 229, 26 N. E. 51, 9 L. R. A. 750, 22 Am. St. Rep. 582; Perley v. Eastern R. Co., 98 Mass. 414, 96 Am. Dec. 645; Delaware, L. & W. R. Co. v. Salmon, 39 N. J. Law, 299, 23 Am. Rep. 214; Adams v. Young, 44 Ohio St. 80, 4 N. E. 599, 58 Am. Rep. 789; Atkinson v. Goodrich Transp. Co., 60 Wis. 141, 18 N. W. 764, 50 Am. Rep. 352.

⁷⁶ Pennsylvania R. Co. v. Kerr, 62 Pa. 353, 1 Am. Rep. 431. The force of this decision, however, has been so greatly weakened that it may be questioned whether the doctrine has not been repudiated. Haverly v. State Line & S. R. Co., 135 Pa. 50, 19 Atl. 1013, 20 Am. St. Rep. 848, which reviews the cases.

CONCURRENCE CAUSE

32. Where the injury is the proximate result of the wrongdoer's act or neglect, he is responsible, though the act or neglect of a third person or an accidental cause concurred in producing it.

Later there will be discussed the liability of joint tortfeasors, and it will be found that the general rule is that the injured party can sue one, any, or all of those who have been engaged in the commission of the wrong.⁷⁷ To fasten liability upon a particular individual it is not required that his wrongdoing should be the sole cause of the injury. It is sufficient that it is an efficient cause, and it will be no answer that another was equally guilty. "The general doctrine is that it is no defense, in actions for injuries resulting from negligence, that the negligence of third persons, or an inevitable accident, or that an inanimate thing contributed to cause the injury to the plaintiff, if the negligence of the defendant was an efficient cause, without which the injury would not have occurred."⁷⁸ This is peculiarly applicable where passengers have been injured by collisions between trains belonging to different roads, caused by the fault of both.⁷⁹

But illustrative cases present an almost infinite variety of

217, 5 L. R. A. 591, sparks from defendant's locomotive set fire to combustible material which it had permitted to accumulate. From thence the fire spread to the lands of C., and from thence to plaintiff's lands. While plaintiff was permitted to recover, yet, as was pointed out in *Hoffman v. King*, supra, where a contrary result was reached, the point that the injury was not the proximate result, not having been raised at the trial, was not before the Court of Appeals.

⁷⁷ See *infra*, p. 236.

⁷⁸ *City of Joliet v. Shufeldt*, 144 Ill. 403, 411, 32 N. E. 969, 18 L. R. A. 750, 36 Am. St. Rep. 453, per Shope, J.

⁷⁹ *Wabash, St. L. & P. Ry. Co. v. Shacklet*, 105 Ill. 364, 44 Am. Rep. 791; *Barrett v. Third Ave. R. Co.*, 45 N. Y. 628; *Mathews v. London St. Tramways Co.*, 52 J. P. 774, 58 L. J. Q. B. 12, 60 L. T. Rep. N. S. 47.

facts. Thus where defendants improperly piled lumber along a gangway, and a team was so negligently driven by one R. that the wheel caught the end of one of the timbers and threw it down, it was said that, "if the timbers were negligently piled by the defendants, the negligence continued until they were thrown down, and (concurring with the action of R.) was a direct and proximate cause of the injury sustained by the plaintiff."⁸⁰ So, where defendant left barrels of fish brine on a public street, which were spilled by a third person, and a cow licked the brine and died, he was held liable; the death of the cow being the proximate consequence of the leaving of the barrels of brine in the street;⁸¹ and where a prescription is improperly written, the fact that the druggist who fills it may also have been negligent is no defense in an action against the physician.⁸² Likewise, where a third party negligently went upon a railroad track, carrying a box of tools upon his shoulder, was struck by defendant's engine, negligently driven, and some of the tools flew through the air, injuring plaintiff, the injury was to be regarded as due to the concurring negligence of the third party and of the defendant.⁸³

Naturally the same result is reached where the act or neglect of the wrongdoer co-operates with an accidental cause, as where a municipality culpably permits a defect to remain in a public highway it will be liable to the injured driver of a horse if the injury would not have resulted but for such defect, although the shying or starting of the horse co-operated to produce it.⁸⁴ Again, where it was claimed that de-

⁸⁰ *Pastene v. Adams*, 49 Cal. 87, 90.

⁸¹ *Henry v. Dennis*, 93 Ind. 452, 47 Am. Rep. 378.

⁸² *Murdock v. Walker*, 43 Ill. App. 590.

⁸³ *Hammill v. Pennsylvania R. Co.*, 56 N. J. Law, 370, 29 Atl. 151, 24 L. R. A. 531. For other cases illustrating this doctrine, see *Lake v. Milliken*, 62 Me. 240, 16 Am. Rep. 456; *Eaton v. Boston & L. R. Co.*, 11 Allen (Mass.) 500, 87 Am. Dec. 730; *Johnson v. Northwestern Tel. Exch. Co.*, 48 Minn. 433, 51 N. W. 225; *SLATER v. MERSEREAU*, 64 N. Y. 138, Chapin Cas. Torts, 111; *Koelsch v. Philadelphia Co.*, 152 Pa. 355, 25 Atl. 522, 18 L. R. A. 759, 34 Am. St. Rep. 653; *Atkinson v. Goodrich Transp. Co.*, 60 Wis. 141, 18 N. W. 764, 50 Am. Rep. 352.

⁸⁴ This view, it is generally held, is applicable only to cases where there is a momentary lack of control by the driver, as where

fendant's dog had caused plaintiff's horse to shy and upset the carriage, it was held that if the act of the dog was the sole and proximate cause of the shying, and the shying was not the result of any vicious habit of the horse, the fact that the shying contributed to the injury would not prevent a recovery.⁸⁵ This principle has been further illustrated by cases already cited, showing that the intervention of a natural force will not break the chain of events.⁸⁶

It should be kept in mind, however, that the concurring cause must not be due to the act or neglect of the plaintiff himself, for, if such should be the case, then, as will be seen later, he will not be entitled to redress from the defendant.⁸⁷ Furthermore, the rule does not do away with the necessity of showing that the alleged wrongdoer has been legally culpable and that the injury is the proximate result of his culpability. "Where there are two or more possible causes of injury, for one or more of which the defendant is not responsible, the plaintiff, in order to recover, must show by evidence that the injury was wholly or partly the result of that cause which would render the defendant liable. If the evidence leaves it just as probable that the injury was the result of

the horse shies or starts, and not to instances where the horse is wholly freed from the driver's control and is running away, on the theory that municipal corporations are not bound to make their roads safe for unmanageable horses. *Aldrich v. Gorham*, 77 Me. 287; *Spaulding v. Winslow*, 74 Me. 528; *Wright v. Templeton*, 132 Mass. 49; *Simons v. Casco Tp.*, 105 Mich. 588, 63 N. W. 500; *Nichols v. Pittsfield Tp.*, 209 Pa. 240, 58 Atl. 283; *Davis v. Snyder Tp.*, 196 Pa. 273, 46 Atl. 301; *Yeaw v. Williams*, 15 R. I. 20, 23 Atl. 33. But in New York it has been held that "where, without any fault of the driver, a horse becomes uncontrollable and runs away, it is regarded as an accidental occurrence, for which the driver is not responsible. * * * When two causes combine to produce an injury to a traveler upon a highway, both of which are in their nature proximate—the one being a culpable defect in the highway, and the other some occurrence for which neither party is responsible—the municipality is liable, provided the injury would not have been sustained but for such defect." *Ring v. City of Cohoes*, 77 N. Y. 83, 88, 33 Am. Rep. 574, per Earl, J.

⁸⁵ *Denison v. Lincoln*, 131 Mass. 236.

⁸⁶ See *supra*, p. 79 et seq.

⁸⁷ See *infra*, pp. 111 et seq., 541 et seq.

one cause as of the other, the plaintiff cannot recover.”⁸⁸ In other words, once it is shown that the act or neglect has been an efficient cause, whether sole or concurring, of the injury, responsibility will attach; but, if this point is left in doubt, the party basing his cause of action or defense thereon will be deemed to have failed in making out his case. The rule as to the burden of proof is not affected by the principle of concurring cause,⁸⁹ though if both causes are concurring, the fact that it is impossible to ascertain to what extent the injury is due to one cause alone will not prevent recovery for the entire damage against a concurring tortfeasor.⁹⁰

⁸⁸ *Grant v. Pennsylvania & N. Y. Canal & R. Co.*, 133 N. Y. 657, 659, 31 N. E. 220. “Guilty or responsible concurrence in causing an injury involves the idea of two or more active agencies co-operating to produce it, either of which must be an efficient cause, without the operation of which the accident would not have happened.” *Leeds v. New York Tel. Co.*, 178 N. Y. 118, 121, 70 N. E. 219, 220, per Gray, J. And see *Pollett v. Long*, 56 N. Y. 200.

⁸⁹ *Taylor v. City of Yonkers*, 105 N. Y. 202, 11 N. E. 642, 59 Am. Rep. 492; *Norfolk & W. R. Co. v. Poole’s Adm’r*, 100 Va. 148, 40 S. E. 627.

⁹⁰ Defendant negligently maintained a ditch in the highway, into which plaintiff drove. The axle of his carriage was broken, and he was dragged partly over the dashboard. On the way to his home he was exposed to the cold and rain. Held, that merely because it was impossible to determine to what extent his injuries were due to the accident (the breaking of the axle and the dragging over the dashboard) and to the subsequent exposure would not prevent recovery for both. It was asked: “Shall this difficulty deprive the plaintiff of all remedy? We answer, No. The wrong of the defendant placed the plaintiff in this dilemma, and it cannot complain if it is held for the entire damage.” *Ehrgott v. Mayor, etc., of City of New York*, 96 N. Y. 264, 284, 48 Am. Rep. 622, per Earl, J.

ACCOMPANYING CONDITION

33. If the wrongful conduct merely furnishes a condition or gives rise to an occasion which makes the injury possible, it will not be regarded as the cause.

It has been seen that, for a cause to be regarded as legally proximate, it must be efficient⁹¹ in the sense that "either it acts directly in producing the injury or sets in motion other causes so producing it and forming a continuous chain in natural sequence down to the injury."⁹² "A proximate cause is one in which is involved the idea of necessity."⁹³ It must be *causa causans* and not merely the *causa sine qua non*. If, therefore, all that can be said is that the wrongdoing of defendant urged as a basis of recovery, or that of the plaintiff relied upon to defeat it, was productive simply of a state of facts which rendered the injury possible, it cannot be regarded as the cause, but will be considered only as a condition, which, although a noticeable factor in the ultimate situation in which the parties found themselves, in the sense that but for its existence the same result would not have been reached, cannot be considered as imposing any responsibility upon the actor.⁹⁴

Now, although all the courts are agreed on the abstract proposition that an essential difference exists between a condition and a cause, they are by no means in accord as to the precise nature of this difference. Thus, as has been seen, there is wide divergence whether a carrier's failure to exercise diligence in transportation is the cause of the loss of the goods en route, where the immediate destruction has been effectuated by an act of nature;⁹⁵ and a similar difference of opin-

⁹¹ *Ætna Ins. Co. v. Boon*, 95 U. S. 117, 130, 24 L. Ed. 395.

⁹² *Meyer v. Milwaukee Electric R. & Light Co.*, 116 Wis. 336, 339, 93 N. W. 6, per Dodge, J.

⁹³ *Selfter v. Brooklyn Heights R. Co.*, 169 N. Y. 254, 258, 62 N. E. 349; *Laidlaw v. Sage*, 158 N. Y. 73, 99, 52 N. E. 679, 44 L. R. A. 216.

⁹⁴ "A condition is a mechanical antecedent, without causal power. A cause is the responsible, voluntary agent, changing the ordinary course of nature." Cicero de Officiis, lib. 1, cited in Whart. Neg. 824.

⁹⁵ See *supra*, pp. 80, 81.

ion exists where plaintiff has received injuries while traveling on Sunday in violation of statute.⁹⁶ Necessarily no definite test can be laid down, and each case must be regarded as largely a law unto itself.

For instance, where a passenger was negligently carried past her destination, and the conductor advised her to spend the night at a certain hotel in the town at which she alighted, agreeing to pay her expenses and to carry her back in the morning, his negligence in carrying her past her station is not to be regarded as a cause of injuries received by her from the explosion of a lamp at the hotel.⁹⁷ A similar conclusion was reached where a railway company had fenced its right of way adjoining the premises of defendants, placing gates for the latter's convenience. Plaintiff's land adjoined that of defendants, and between them was another fence. A heavy windstorm blew down a tree, which broke the fence, and plaintiff's cattle passed through the gap, and from thence over defendants' land to the tracks by means of a gate which defendants had left open, and were killed by a train. The leaving open of the gate was here a condition of the loss, but the cause was the breach by the fall of the tree.⁹⁸ Again, where a borough negligently permits a tree to remain standing in a street notwithstanding its dangerous condition, which is blown down and strikes a motorman who is running his car at an illegal rate of speed, the illegal speed is a condition merely.⁹⁹

An extended citation of authorities would serve no good purpose, particularly as the difference between condition and cause will be best illustrated when there is considered the illegality of plaintiff's conduct as a bar to his recovery.¹⁰⁰ It has been well said that the distinction between cause and condition would be valuable, if there were any definite standard

⁹⁶ See *infra*, p. 114.

⁹⁷ *Central of Georgia Ry. Co. v. Price*, 106 Ga. 176, 32 S. E. 77, 43 L. R. A. 402, 71 Am. St. Rep. 246.

⁹⁸ *Strobeck v. Bren*, 93 Minn. 428, 101 N. W. 795.

⁹⁹ *Berry v. Borough of Sugar Notch*, 191 Pa. 345, 43 Atl. 240.

¹⁰⁰ See *infra*, p. 111 et seq.

for determining what is a cause and what is a condition. The only test by which this can be settled is the same as that which determines a proximate from a remote cause.¹⁰¹

FUNCTIONS OF COURT AND JURY

34. Whether the injury is the proximate result of the wrongful act or neglect is generally deemed a question of fact to be decided by the jury.

"The true rule is that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it."¹⁰² Thus, where the plaintiff's sheep escaped from his pasture through defendant's negligence, wandered away, and were killed by bears, it was a question for the jury, under proper instructions, whether the defendant's negligence was the proximate cause of the loss.¹⁰³

But to this rule there is an exception in cases where the facts are undisputed and only one inference or deduction is to be drawn from them. A question is then presented for the court, as it is the province of the jury to determine only in cases of conflict.¹⁰⁴ Hence, where defendant sold two pounds of gunpowder to plaintiff, a child of eight years, and the latter brought it home and placed it in a closet, from which some of it was taken by his mother and handed to him to play with, and later more was taken by the child with

¹⁰¹ Jaggard on Torts, p. 64.

¹⁰² *MILWAUKEE & ST. P. RY. CO. v. KELLOGG*, 94 U. S. 469, 474, 24 L. Ed. 256, Chapin Cas. Torts, 31, per Strong, J.

¹⁰³ *Gilman v. Noyes*, 57 N. H. 627. To the same effect, *Pullman Palace Car Co. v. Bluhm*, 109 Ill. 20, 50 Am. Rep. 601; *Schumaker v. St. Paul & D. R. Co.*, 46 Minn. 39, 48 N. W. 559, 12 L. R. A. 257; *Cox v. Pennsylvania R. Co.*, 76 N. J. Law, 786, 71 Atl. 250; *Ehrgott v. Mayor, etc., of City of New York*, 96 N. Y. 264, 48 Am. Rep. 622; *Scott v. Hunter*, 46 Pa. 192, 84 Am. Dec. 542.

¹⁰⁴ *Missouri Pac. R. Co. v. Columbia*, 65 Kan. 390, 69 Pac. 338, 58 L. R. A. 399; *Henry v. St. Louis, K. O. & N. Ry. Co.*, 76 Mo. 288, 43 Am. Rep. 762; *West Mahanoy Tp. v. Watson*, 112 Pa. 574, 3 Atl. 866, 56 Am. Rep. 336.

the mother's knowledge, the jury should have been instructed to return a verdict for defendant in an action brought to recover for injuries due to an explosion caused by the child. There could here be no dispute that the negligence of the mother had intervened.¹⁰⁵ So, under the New York doctrine, a motion for a nonsuit was improperly refused where plaintiff's evidence, in an action to recover for the destruction of property by a fire negligently started on defendant's land, showed that lands of other owners intervened between plaintiff's land and the origin of the fire.¹⁰⁶

¹⁰⁵ *Carter v. Towne*, 103 Mass. 507.

¹⁰⁶ *Van Inwegen v. Port Jervis, M. & N. Y. R. Co.*, 165 N. Y. 625, 58 N. E. 878.

CHAPTER IV

GENERAL PRINCIPLES (CONTINUED)—DEFENSES

35. In General.

36. Inherent Defenses.

- (1) Necessity.
- (2) Acts of State.
- (3) The Police Power.
- (4) Illegal Conduct of Plaintiff.
- (5) License.

37. Collateral Defenses.

- (1) Abatement by Death.
- (2) Accord and Satisfaction.
- (3) Release and Covenant Not to Sue.
- (4) Statutes of Limitation.

IN GENERAL

35. There will be considered here certain defenses applicable in general to tort actions. For those of special application, reference must be made to the specific torts as treated elsewhere.

Broadly speaking, defenses to a claim of wrongdoing may be: (1) Inherent, in the sense that they are based upon the very facts upon which it is sought to predicate a tort, or on contemporaneous circumstances forming a part of the transaction; or (2) collateral, which depend upon facts arising entirely outside of and beyond the alleged tortious occurrence.

INHERENT DEFENSES

36. Of the inherent defenses there will be considered—

- (1) Necessity;
- (2) Acts of state;
- (3) The police power;
- (4) Illegal conduct of plaintiff;
- (5) License.

Other inherent defenses to be taken up later are defense of person and property, enforcement of discipline, assumption of risk, contributory negligence, and the privilege accorded to defamation under certain circumstances.

Necessity

There are occasions when private rights must give way to the common welfare. "It is a maxim of the common law that, where public convenience and necessity come in conflict with private right, the latter must yield to the former."¹ Necessarily such cases must be comparatively few in number, as the necessity which would justify an interference with private rights should be extreme; but the principle, though restricted in its application, is none the less settled. For example,² we have the destruction of property to prevent the spread of fire,³ or disease,⁴ or to lessen the danger from a

¹ *Campbell v. Race*, 7 Cush. (Mass.) 408, 412, 54 Am. Dec. 728, per Bigelow, J.

² "The principle, as it is usually found stated in the books, is that, 'if a house in a street be on fire, the adjoining houses may be pulled down to save the city.' But this is obviously intended as an example of the principle, rather than as a precise definition of its limits. The principle applies as well to personal as to real estate; to goods as to houses; to life as to property—in solitude as in a crowded city; in a state of nature as in civil society. It is referred by moralists and by jurists to the same great principle, which justifies the exclusive appropriation of a plank in a shipwreck, though the life of another be sacrificed; with the throwing overboard of goods in a tempest for the safety of the vessel; with the taking of food to satisfy the instant demands of hunger; with trespassing upon the lands of another to escape death from an enemy. It rests upon the maxim, '*Necessitas inducit privilegium quoad jura privata*.'" *American Print Works v. Lawrence*, 21 N. J. Law, 248, 257, per Green, C. J.

³ *SUROCCO v. GEARY*, 3 Cal. 69, 58 Am. Dec. 385, Chapin Cas. Torts, 52; *Field v. City of Des Moines*, 39 Iowa, 575, 28 Am. Rep. 46; *Taylor v. Inhabitants of Plymouth*, 8 Metc. (Mass.) 462; Mayor,

⁴ *Meeker v. Van Rensselaer*, 15 Wend. (N. Y.) 397 (destruction of filthy building calculated to spread disease, same having been done during prevalence of Asiatic cholera); *Seavey v. Preble*, 64 Me. 126 (removal of wall paper smeared with smallpox virus). And see abatement of nuisances, *infra*, p. 571.

hostile advancing army;⁵ a dangerous maniac may be restrained temporarily until he can be safely released, or can be arrested upon legal process, or committed to the asylum under legal authority;⁶ under certain conditions the private citizen is justified in arresting a criminal;⁷ one may destroy property to save human life,⁸ or may enter upon the premises of another for the same purpose,⁹ or to preserve property in peril from the elements,¹⁰ though not from peril due to the wrongdoing of the trespasser,¹¹ or of a third party;¹² and, where a highway becomes obstructed and impassable from temporary causes, a traveler may go *extra viam* upon adjoining lands.¹³

Acts of State

Though the state as a distinct entity may perpetrate a wrong through its agents, nevertheless, as sovereign and not amenable to legal process, it cannot be sued, except with

etc., of *City of New York v. Lord*, 17 Wend. (N. Y.) 285; *Bowditch v. Boston*, 101 U. S. 16, 25 L. Ed. 980. In some states the statute provides for compensation. See *Taylor v. Inhabitants of Plymouth*, supra; *Mayor, etc., of City of New York v. Lord*, 18 Wend. (N. Y.) 126; "Compensation for Property Destroyed to Stop the Spread of a Conflagration," by Hall & Wigmore, 1 Ill. Law Rev. 501.

⁵ *Harrison v. Wisdom*, 7 Helsk. (Tenn.) 99 (destruction of intoxicating liquors in anticipation of the arrival of an enemy).

⁶ *Keleher v. Putnam*, 60 N. H. 30, 49 Am. Rep. 304; *Fletcher v. Fletcher*, 1 E. & E. 420, 5 Jur. N. S. 678, 28 L. J. Q. B. 134, 7 Wkly. Rep. 187, 102 E. C. L. 420. And see *infra*, p. 285.

⁷ See *infra*, p. 282 et seq.

⁸ Passengers, to save their lives, may cast cargo overboard without incurring liability to the owner. *Mouse's Case*, 12 Coke, 63.

⁹ *Ploof v. Putnam*, 81 Vt. 471, 71 Atl. 188, 20 L. R. A. (N. S.) 152, 130 Am. St. Rep. 1072, 15 Ann. Cas. 1151.

¹⁰ *PROCTOR v. ADAMS*, 113 Mass. 376, 18 Am. Rep. 500, Chapin Cas. Torts, 54.

¹¹ See *Newkirk v. Sabler*, 9 Barb. (N. Y.) 652.

¹² Thus, in trespass, where defendant justified because the corn was set apart for tithes, and was in danger of destruction by cattle, and defendant took it to the barn of plaintiff, who was parson of the vill, it was held that the plea was not good; for, if the corn "had been destroyed, the plaintiff would have his remedy against the destroyer." *Anonymous*, Y. B. 21 Hen. VIII, 27, pl. 5. In accord, *McCarroll v. Stafford*, 24 Ark. 224.

¹³ *Campbell v. Race*, 7 Cush. (Mass.) 408, 54 Am. Dec. 728.

its own consent.¹⁴ As will be seen hereafter, this immunity does not in general extend to its officers¹⁵ for acts committed against their fellow citizens or subjects,¹⁶ though it is otherwise where injury results to an alien. It is essential, however, in order that the alien may be debarred from recovery, that the act shall have been done by the direct command of, or have been subsequently ratified by, the sovereign.¹⁷ When either of these facts appear, the public officer is not liable. This principle has been applied where vessels belonging to subjects of Spain were seized in the late war, although they had been adjudged by a prize court not to be subject of capture, where the United States, though it might have ordered their release, failed to do so and sought a forfeiture;¹⁸ also where the American military governor of Cuba abolished plaintiff's hereditary right to a monopoly of the slaughter of cattle in the city of Havana.¹⁹

The Police Power

Growing out of the doctrine of necessity is the right "which inheres in the state and in each political division thereof to

¹⁴ See *infra*, p. 196.

¹⁵ See *infra*, p. 138 et seq.

¹⁶ *United States v. Lee*, 106 U. S. 196, 1 Sup. Ct. 240, 27 L. Ed. 171; *Mitchell v. Harmony*, 13 How. 115, 14 L. Ed. 75.

¹⁷ "When the act of a public officer is authorized or has been adopted by the sovereign power, whatever the immunities of the sovereign, the agent thereafter cannot be pursued." *United States v. The Paquete Habana*, 189 U. S. 453, 465, 23 Sup. Ct. 593, 594, 47 L. Ed. 900, per Holmes, J.

¹⁸ *United States v. The Paquete Habana*, *supra*.

¹⁹ *O'Reilly de Camara v. Brooke*, 209 U. S. 45, 28 Sup. Ct. 439, 52 L. Ed. 676. Defendant, a naval commander stationed off the coast of Africa with instructions to suppress the slave trade, fired the barracoons of plaintiff, a Spaniard, and liberated the slaves. These proceedings were reported to the lords of the admiralty and the foreign and colonial secretaries of state, and were adopted and ratified by them. It was held that, the ratification being equivalent to a prior command, defendant was not liable, for his acts were acts of state. *BURON v. DENMAN*, 2 Exch. 167, *Chapin Cas. Torts*, 56. Seizure of the property of the deceased Rajah of Tanjore by the East India Company as an escheat, having been ratified by the English government, became an act of state. *Secretary of State v. Kamachee Bore Sahaba*, 7 Moore, *Indian App.* 476, 19 Eng. Repr. 388, 13 Moore, *P. C.* 22, 15 Eng. Repr. 9.

protect by such restraints and regulations as are reasonable and proper the lives, health, comfort and property of its citizens,"²⁰ which is somewhat indefinitely termed "the police power." An extended discussion of this feature of government is unnecessary in the present work. Indeed, it has been said by a learned jurist that "it is much easier to perceive and realize the existence and sources of this power than to mark its boundaries or prescribe limits to its exercise."²¹

Regulations have therefore been sustained which provided for the enforcement of quarantine laws, whether to safeguard man²² or cattle,²³ or designed otherwise to protect the public health,²⁴ safety,²⁵ or morals.²⁶ Neither the municipality nor

²⁰ *City of Rochester v. West*, 29 App. Div. 125, 128, 51 N. Y. Supp. 482, per Adams, J., affirmed 164 N. Y. 510, 58 N. E. 673, 53 L. R. A. 548, 79 Am. St. Rep. 659. And see *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923.

²¹ *Commonwealth v. Alger*, 7 Cush. (Mass.) 53, 85, per Shaw, C. J. A number of instances are here enumerated. "Such are the laws to prohibit the use of warehouses for the storage of gunpowder near habitations or highways; to restrain the height to which wooden buildings may be erected in populous neighborhoods, and require them to be covered with slate or other incombustible material; to prohibit buildings from being used for hospitals for contagious diseases, or for the carrying on of noxious or offensive trades; to prohibit the raising of a dam, and causing stagnant water to spread over meadows near inhabited villages, thereby raising noxious exhalations, injurious to health and dangerous to life."

²² *Train v. Boston Disinfecting Co.*, 144 Mass. 523, 11 N. E. 929, 59 Am. Rep. 113 (disinfection of rags); *Levin v. Burlington*, 129 N. C. 184, 39 S. E. 822, 55 L. R. A. 396 (arrest of one exposed to smallpox).

²³ *Smith v. St. Louis & S. W. R. Co.*, 181 U. S. 248, 21 Sup. Ct. 603, 45 L. Ed. 847; *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 18 Sup. Ct. 488, 42 L. Ed. 878 (exclusion of cattle likely to be diseased).

²⁴ As in cases of compulsory vaccination (see *Morris v. City of Columbus*, 102 Ga. 792, 30 S. E. 850, 42 L. R. A. 175, 66 Am. St. Rep. 243; *Commonwealth v. Pear*, 183 Mass. 242, 66 N. E. 719, 67 L. R. A. 935; *Jacobson v. Massachusetts*, 197 U. S. 11, 25 Sup. Ct. 358, 49 L. Ed. 643, 3 Ann. Cas. 765); the abatement of a privy vault (*Harrington v. Board of Aldermen of City of Providence*, 20 R. I. 233, 38 Atl. 1, 38 L. R. A. 305); removal of garbage and filth (*People*

²⁵ See note 25 on following page.

²⁶ See note 26 on following page.

its officers acting under proper authority are liable for acts done in their enforcement.²⁷

But this power is not unlimited. "To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The Legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."²⁸ Thus an act which prohibits the driving of all Texas, Mexican, or Indian cattle into Missouri between certain dates is not a legitimate exercise of the police power, although it would have been otherwise if it had prohibited the entry of diseased cattle.²⁹ Nor may the Legislature pro-

v. Gordon, 81 Mich. 306, 45 N. W. 658, 21 Am. St. Rep. 524; *Town of Newtown v. Lyons*, 11 App. Div. 105, 42 N. Y. Supp. 241); and the destruction of damaged grain (*Dunbar v. City Council of Augusta*, 90 Ga. 390, 17 S. E. 907).

²⁸ Prohibiting the keeping of more than certain quantity of gunpowder, except in approved magazines, *Davenport v. Richmond City*, 81 Va. 636, 59 Am. Rep. 694; providing for the destruction of decaying buildings, *Fields v. Stokley*, 99 Pa. 306, 44 Am. Rep. 109; regulating the height of bill boards, *City of Rochester v. West*, 164 N. Y. 510, 58 N. E. 673, 53 L. R. A. 548, 79 Am. St. Rep. 659, affirming 29 App. Div. 125, 51 N. Y. Supp. 482.

²⁹ *Ex parte McClain*, 134 Cal. 110, 66 Pac. 69, 54 L. R. A. 779, 86 Am. St. Rep. 243.

²⁷ *Newark & S. O. H. C. Ry. Co. v. Hunt*, 50 N. J. Law, 308, 12 Atl. 697, where assistants of the State Board of Health destroyed plaintiff's horse, affected with glanders. And see cases cited in preceding notes.

²⁸ *Lawton v. Steele*, 152 U. S. 133, 137, 14 Sup. Ct. 499, 38 L. Ed. 385, per Brown, J., holding constitutional a provision for the summary seizure and destruction of fishing nets of slight value, maintained in violation of statute.

²⁹ *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. Ed. 527.

vide that meats shall not be sold, unless taken from animals which shall have been inspected and certified by local officers twenty-four hours before killing, since this amounts to an absolute prohibition of meat importation.⁸⁰

Illegal Conduct of Plaintiff

It is obvious that no one may be permitted to derive advantage from his own illegal act. It matters not that he from whom the injury was received was likewise a wrongdoer, since it is a settled principle that where the parties are in equal fault the condition of the defendant is the better,⁸¹ by which is meant that the law will leave guilty parties where it finds them.⁸² Consequently, if the illegal conduct of the injured party proximately causes, or even concurs in causing, his injury, he will be without redress. This doctrine has been applied where a participator in a charivari party was carelessly shot by another member while disturbing the peace of a wedding assemblage contrary to the statute;⁸³ also where plaintiff, while walking on the grass of a public garden in violation of a city ordinance, fell into a trench.⁸⁴ No relief will be given to one who is defrauded in the sale of a lottery ticket, where the sale of lottery tickets is prohibited,⁸⁵ or who seeks to enforce the copyright of a libelous or licentious book⁸⁶ or song,⁸⁷ or asks protection against unfair competition, if in transacting the business sought to be protected, he

⁸⁰ *Minnesota v. Barber*, 136 U. S. 313, 10 Sup. Ct. 862, 34 L. Ed. 455. And see *Rockwell v. Nearing*, 35 N. Y. 302; *Dunn v. Burleigh*, 62 Me. 24; *Baldwin v. Smith*, 82 Ill. 162; *Baltimore & O. R. Co. v. Waters*, 105 Md. 396, 66 Atl. 685, 12 L. R. A. (N. S.) 326; *State v. Wittles*, 118 Minn. 364, 136 N. W. 883, 41 L. R. A. (N. S.) 456, Ann. Cas. 1913E, 433.

⁸¹ "In pari delicto potior est conditio defendentis."

⁸² See *infra*, p. 237.

⁸³ *Gilmore v. Fuller*, 198 Ill. 130, 65 N. E. 84, 60 L. R. A. 286.

⁸⁴ *Sheehan v. City of Boston*, 171 Mass. 296, 50 N. E. 543.

⁸⁵ *Kitchen v. Greenbaum*, 61 Mo. 110.

⁸⁶ See *Stockdale v. Ohnwhyn*, 5 B. & C. 173, 11 E. C. L. 416, 108 Eng. Repr. 65, 2 C. & P. 163, 12 E. C. L. 506, 7 D. & R. 625, 4 L. J. K. B. O. S. 122, 29 Rev. Rep. 207.

⁸⁷ *Broder v. Zeno Mauvais Music Co.* (C. C.) 88 Fed. 74.

is deceiving the public,³⁸ or if such business is inherently illegal.³⁹

Two points, however, must be kept in mind: First, that there was *conscious* wrongdoing on plaintiff's part;⁴⁰ and, second, that the illegal conduct is a proximate or concurring cause, for if, as already seen, it merely renders the injury possible, it will be treated as a condition, and will not bar recovery. It has been said that "the test in each case is whether, when all the facts are disclosed, the action appears to be founded in a violation of law in which the plaintiff has taken part,"⁴¹ or, put another way, whether the plaintiff will be forced to prove the illegal transaction in order to make out his case.⁴² Probably this is as definite a statement as can be made, where each case must largely be a law unto itself.

Thus, where defendant willfully ran down plaintiff and broke the latter's sleigh, it would constitute no defense that the parties were racing illegally for a purse. Plaintiff did

³⁸ This includes "any material misrepresentation in a label or trade-mark as to the person by whom the article is manufactured, or as to the place where manufactured, or as to the materials composing it." *Prince Mfg. Co. v. Prince's Metallic Paint Co.*, 135 N. Y. 24, 38, 31 N. E. 990, 17 L. R. A. 129, per Andrews, J. To the same effect, *Connell v. Reed*, 128 Mass. 477, 35 Am. Rep. 397; *Clinton E. Worden & Co. v. California Fig Syrup Co.*, 187 U. S. 516, 23 Sup. Ct. 161, 47 L. Ed. 282; *Memphis Keeley Institute v. Leslie E. Keeley Co.*, 153 Fed. 964, 84 C. C. A. 112, 16 L. R. A. (N. S.) 921.

³⁹ Thus fortune tellers, who by statute are defined to be disorderly persons, will not be entitled to an injunction against competitors who have adopted unfair business methods. *Fay v. Lambourne*, 124 App. Div. 245, 108 N. Y. Supp. 874, affirmed 196 N. Y. 575, 90 N. E. 1158.

⁴⁰ Recovery may be had for losses sustained in the Jameson raid against the South African Republic, where plaintiff was induced to participate therein by defendant's statements that the service on which he was to be employed was of a lawful nature. *Burrows v. Rhodes*, [1899] 1 Q. B. 816, 63 J. P. 532, 68 L. J. Q. B. 545, 80 L. T. Rep. N. S. 591, 15 T. L. R. 286, 48 Wkly. Rep. 13.

⁴¹ *Hall v. Corcoran*, 107 Mass. 251, 253, 9 Am. Rep. 30, per Gray, J.

⁴² *Gregg v. Wyman*, 4 Cush. (Mass.) 322; *Koepke v. Peper*, 155 Iowa, 687, 136 N. W. 902, 41 L. R. A. (N. S.) 773.

not require aid from an illegal transaction in order to recover.⁴³ A similar result was reached by the same court in the case of a collision, where plaintiff's cab was facing the sidewalk at an angle, contrary to an ordinance which required that vehicles should be drawn up lengthwise with the street. The violation of the ordinance, it is true, was evidence of negligence; but it was not conclusive. It was held, therefore, that the trial court rightly refused to instruct that the plaintiff could not recover if at the time he was violating an ordinance, and so doing an unlawful act, since this ignores the distinction between illegality which is a cause and illegality which is a condition.⁴⁴ So, too, if a vessel omit to carry lights or to take the course prescribed by law, the right of the owner to recover damages for a collision due to the neg-

⁴³ "He had no occasion to show into what stipulations the parties had entered, or what were the rules or regulations by which they were to be governed in the race, or whether they were in fact engaged in any such business at all. * * * It was the defendant, and not the plaintiff, who had occasion to invoke assistance from proof of the illegal agreement and conduct, in which both parties had equally participated. From such sources neither of the parties should have been permitted to derive a benefit. The plaintiff sought nothing of this kind, and the mutual misconduct of the parties in one particular cannot exempt the defendant from his obligation to respond for the injurious consequences of his own illegal misbehavior in another." *WELCH v. WESSON*, 6 Gray (Mass.) 505, Chapin Cas. Torts, 58, per Merrick, J.

⁴⁴ "Of course, it [plaintiff's vehicle] could not have been struck if it had not been in the place where the blow came. But this is a statement of an essential condition, and not of a cause of the impact. The distinction is between that which directly and proximately produces or helps to produce a result as an efficient cause, and that which is a necessary condition or attendant circumstance of it. If the position of the plaintiff's vehicle was such as, in connection with ordinary and usual concurring cause, would naturally produce such an accident, that indicates that it contributed to it. But, even in that case, external causes may have been so exclusive in their operation, and so free from any relation to the position of the vehicle, as to have left that a mere condition, without agency in producing the result." *Newcomb v. Boston Protective Department*, 146 Mass. 596, 604, 16 N. E. 555, 559, 4 Am. St. Rep. 354, per Knowlton, J. To the same effect, *Steele v. Burkhardt*, 104 Mass. 59, 6 Am. Rep. 191.

ligence of the other party depends on whether such omission directly causes or contributes to the injury. The most that can be claimed is that the noncompliance may authorize a presumption, in the absence of evidence to the contrary, that the collision was attributable thereto.⁴⁵

Whether the violation of an act prohibiting travel on Sunday will be regarded as a contributing cause of an injury, which, although due to the defendant's act or neglect, was nevertheless received by one while so traveling, is a mooted question.⁴⁶ But in many of the states, whose courts have answered in the affirmative, the Legislature has subsequently provided that a violation of the Sunday law shall not constitute a defense to an action for a tort or injury suffered on that day.⁴⁷

License

He who consents can receive no injury.⁴⁸ "If the defendant is guilty of no wrong against the plaintiff, except a wrong invited and procured by the plaintiff for the purpose of making it the foundation of an action, it would be most unjust that the procurer of a wrongful act should be permitted to profit by it."⁴⁹ For this reason, if defamatory matter be

⁴⁵ *Blanchard v. New Jersey Steamboat Co.*, 59 N. Y. 292. For further illustrations, see *Atlanta St. R. Co. v. Walker*, 93 Ga. 462, 21 S. E. 48; *Klipper v. Coffey*, 44 Md. 117; *Connolly v. Knickerbocker Ice Co.*, 114 N. Y. 104, 21 N. E. 101, 11 Am. St. Rep. 617; *Clark v. Raleigh & G. R. Co.*, 63 N. C. 326, note; *Berry v. Borough of Sugar Notch*, 191 Pa. 345, 43 Atl. 240; *Neanow v. Uttech*, 46 Wis. 581, 1 N. W. 221.

⁴⁶ That it is not, see *Delaware, L. & W. R. Co. v. Trautwein*, 52 N. J. Law, 169, 19 Atl. 178, 7 L. R. A. 435, 19 Am. St. Rep. 442; *Platz v. City of Cohoes*, 89 N. Y. 219, 42 Am. Rep. 286; *Carroll v. Staten Island R. Co.*, 58 N. Y. 126, 17 Am. Rep. 221; *Sutton v. Town of Wauwatosa*, 29 Wis. 21, 9 Am. Rep. 534. That it is, see *Parker v. Latner*, 60 Me. 328, 11 Am. Rep. 210; *Lyons v. Desotelle*, 124 Mass. 387; *Bosworth v. Swansey*, 10 Metc. (Mass.) 363, 43 Am. Dec. 441.

⁴⁷ St. Mass. 1884, c. 37, § 1; *Bridges v. Bridges*, 93 Me. 557, 45 Atl. 827.

⁴⁸ "Volenti non fit injuria."

⁴⁹ *Howland v. George F. Blake Mfg. Co.*, 156 Mass. 548, 570, 31 N. E. 656, per Knowlton, J.

published at the request of the person defamed, no action lies.⁵⁰ So where one is arrested in one county, and by his own request is committed to the jail in another, he cannot, in an action for false imprisonment, be heard to complain of the very acts which were done with his approval.⁵¹ Nor does a right of recovery exist in favor of one who assents to the taking of earth from his premises,⁵² the diversion of water,⁵³ the obstruction of a ditch,⁵⁴ or to the entry of sewage.⁵⁵ This principle applies where the defendant pleads that his act was a joke, in which case it becomes a question for the jury whether the parties had been perpetrating practical jokes on each other to such an extent that defendant had a right to believe that plaintiff would regard the matter in that aspect.⁵⁶

But, though it makes no difference that the consent is reluctant,⁵⁷ it must be voluntary, not induced by fraud or duress,⁵⁸ and given by one who is not divested of his power to refuse by reason of total or partial want of mental faculties.⁵⁹ Still consent, though procured by means of fraudulent concealment, is none the less a defense, where there was no duty owing by the other party to disclose the facts.⁶⁰

⁵⁰ *Howland v. George F. Blake Mfg. Co.*, supra; *King v. Waring*, 5 Esp. 13.

⁵¹ *Ellis v. Cleveland*, 54 Vt. 437.

⁵² *Sweetser v. Boston & M. R. Co.*, 66 Me. 583.

⁵³ *Churchill v. Baumann*, 104 Cal. 369, 36 Pac. 93, 38 Pac. 43.

⁵⁴ *Illinois Cent. R. Co. v. Allen*, 39 Ill. 205.

⁵⁵ *Searing v. Village of Saratoga Springs*, 39 Hun (N. Y.) 307, affirmed 110 N. Y. 643, 17 N. E. 873. For other illustrations, see *Toll Bridge Co. v. Betsworth*, 30 Conn. 380; *Linda v. Hudson*, 1 Cush. (Mass.) 385; *Reams v. Pancoast*, 111 Pa. 42, 2 Atl. 205.

⁵⁶ *Wartman v. Swindell*, 54 N. J. Law, 589, 25 Atl. 356, 18 L. R. A. 44; *Fitzgerald v. Cavin*, 110 Mass. 153.

⁵⁷ *Latter v. Braddell*, 50 L. J. Q. B. 166, 43 L. T. Rep. N. S. 605, 29 Wkly. Rep. 239, affirmed 45 J. P. 520, 50 L. J. Q. B. 448, 44 L. T. Rep. N. S. 369, 29 Wkly. Rep. 366.

⁵⁸ *Johnson v. Girdwood*, 7 Misc. Rep. 651, 28 N. Y. Supp. 151.

⁵⁹ *McCue v. Klein*, 60 Tex. 168, 48 Am. Rep. 260.

⁶⁰ Thus, where defendant was charged with infecting plaintiff with venereal disease, it was held that, as the latter had consented to the commission of an illegal act, defendant's silence as to his condition did not give a cause of action. *Hegarty v. Shine*, L. R. 4 Ir. 288, 14 Cox, C. C. 145.

Again, the consent may have been limited by its very terms, in which case the defendant, if he overstep the bounds, will subject himself to liability. A patient consenting to an operation gives a license to a species of battery; but if, for instance, he agree only to an operation upon the left ear, the surgeon may not operate upon the right, unless in the course of the operation conditions not anticipated should be discovered which, if not instantly removed, would endanger the patient's life or health in which case the emergency will justify the physician in proceeding further.⁶¹

There can furthermore be no consent to the doing of an unlawful act. Hence, if two persons engage voluntarily in combat, each may sue the other, since their prior agreement is absolutely void.⁶² This applies, also, to assaults inflicted pursuant to the rules of a club of which the injured party was a member.⁶³

It would appear at first blush inconsistent with the rule just stated that plaintiff's consent to a seduction should bar the cause of action, whether such consenting plaintiff be the parent or husband⁶⁴ or the woman seduced.⁶⁵ Seduction may

⁶¹ *Mohr v. Williams*, 95 Minn. 261, 104 N. W. 12, 1 L. R. A. (N. S.) 439, 111 Am. St. Rep. 462, 5 Ann. Cas. 303. But see *Bennan v. Parsonnet*, 83 N. J. Law, 20, 83 Atl. 948.

Permission to conduct an autopsy is not a license to remove any part of the remains. *Palmer v. Broder*, 78 Wis. 483, 47 N. W. 744.

⁶² *Grotten v. Glidden*, 84 Me. 589, 24 Atl. 1008, 30 Am. St. Rep. 413; *Commonwealth v. Collberg*, 119 Mass. 350, 20 Am. Rep. 328; *Barholt v. Wright*, 45 Ohio St. 177, 12 N. E. 185, 4 Am. St. Rep. 535; *White v. Barnes*, 112 N. C. 323, 16 S. E. 922. One who is armed with a revolver in violation of statute is liable for an injury caused by its discharge, notwithstanding the person injured was consenting to his being so armed. *EVANS v. WAITE*, 83 Wis. 286, 53 N. W. 445, Chapin Cas. Torts, 60.

⁶³ Defendants and prosecutrix were members of a benevolent society known as the "Good Samaritans." In accordance with its rules, the ceremony of expulsion was performed by suspending prosecutrix from the wall by means of a cord fastened around her waist. Assent to the rules was not a defense. *State v. Williams*, 75 N. C. 134.

⁶⁴ *Rea v. Tucker*, 51 Ill. 110, 99 Am. Dec. 539; *Vossell v. Cole*, 10 Mo. 634, 47 Am. Dec. 136; *Reddie v. Scoolt*, Peake, 240.

⁶⁵ *Hamilton v. Lomax*, 26 Barb. (N. Y.) 615; *Paul v. Frazier*, 3 Mass. 71, 3 Am. Dec. 95; *Conlon v. Cassidy*, 17 R. I. 518, 23 Atl.

be and usually is forbidden by positive law, just as is assault. Perhaps the true distinction is that a man cannot consent to do anything which is a breach of public duty. An assault is a breach of the peace. Seduction, however, while it may be punished as a crime, involves personal, rather than public, duty.⁶⁶

COLLATERAL DEFENSES

37. Of the collateral defenses there will be considered—

- (1) Abatement by death;
- (2) Accord and satisfaction;
- (3) Release and covenant not to sue;
- (4) Statutes of limitation.

Abatement by Death

At common law the death of a sole party to an action before the verdict was rendered worked an abatement,⁶⁷ and, though in some cases a new action might be brought by or on behalf of the personal representative of the deceased, "the truth is that in the earliest times of English law survival of causes of action was a rare exception, non-survival was the rule."⁶⁸ Indeed, it was observed as late as 1888 that we are left still in the dark as to the exact meaning or source of the maxim, "*Actio personalis moritur cum persona.*"⁶⁹ A distinction was made, however, at an early date, between torts to the person and those affecting proprietary rights, and thus we find that actions of trespass for the taking of personal property were by St. 2 Edw. III, c. 7, permitted to be maintained by executors where the taking was in the lifetime of

100. But in some states the seduced woman is permitted to sue. See *infra*, p. 287.

⁶⁶ Jaggard on Torts, vol. 7, p. 203.

⁶⁷ *Evans v. Cleveland*, 72 N. Y. 486.

⁶⁸ *Finlay v. Chirney*, [1888] L. A. 20 Q. B. D. 494, 503, per Bowen, L. J. And see *Jones v. Barmm*, 217 Ill. 381, 75 N. E. 505.

⁶⁹ A personal right of action dies with the person. *Finlay v. Chirney*, *supra*. It is suggested by Sir Frederick Pollock that the rule may have come into operation when the processes of the courts were finally putting aside the right of private redress for wrongs which had prevailed under what may be called customary law. "A process which is still felt to be a substitute for private war

their testator. Another act passed in the fifteenth year of the same reign (chapter 5) gave a like action to administrators. The change was exceedingly slow, for it was not until St. 3 and 4 Wm. IV, c. 42, that executors and administrators were enabled to maintain an action for injuries to the real estate of the deceased.⁷⁰ But the common-law rule continued to be applied in all strictness to torts of a purely personal nature, where "neither the executors of the plaintiff have received, nor those of the defendant have committed, in their own personal capacity, any manner of wrong or injury."⁷¹ Hence, if A. commit an assault upon B.,⁷² or defame him,⁷³ or so instigate an action against him that a suit for malicious prosecution will lie,⁷⁴ or if through A.'s negligence B. receive personal injuries,⁷⁵ it has been held that the death of either party will abate the cause of action. A similar ruling has been made in cases of false imprisonment⁷⁶ and breach of promise of marriage.⁷⁷ But no universal rule can be laid down which will hold good at the present time, since the legislatures of some states have changed the common-law principle with respect to one or more of the causes of action just enumerated, and resort must therefore be had to the statutes.

There is, however, an underlying distinction, where the death of the wrongdoer has occurred, between torts by which the offender has acquired no gain to himself at the expense of the sufferer, as by beating, imprisoning, or slandering him, and those whereby property was acquired by the wrongdoer;

may seem incapable of being continued on behalf of or against a dead man's estate." Pollock on Torts (6th Ed.) p. 61; Bigelow on Torts, p. 65.

⁷⁰ *Zabriski v. Smith*, 13 N. Y. 322, 333, 64 Am. Dec. 551.

⁷¹ Bl. Comm. bk. III, p. 302.

⁷² *Hadley v. Bryars' Adm'r*, 58 Ala. 185.

⁷³ *Walters v. Nettleton*, 5 Cush. (Mass.) 544.

⁷⁴ *Clark v. Carroll*, 59 Md. 180; *Conly v. Conly*, 121 Mass. 550.

⁷⁵ *Boor v. Lowrey*, 103 Ind. 468, 3 N. E. 151, 53 Am. Rep. 519; *Baltimore & O. R. Co. v. Ritchie*, 31 Md. 191; *Curry v. Town of Mannington*, 23 W. Va. 14.

⁷⁶ *Harker v. Clark*, 57 Cal. 245.

⁷⁷ *Wade v. Kalbfleisch*, 58 N. Y. 282, 17 Am. Rep. 250; *Finlay v. Chirney*, [1888] L. R. 20 Q. B. D. 494.

for in the latter instance a cause of action will generally be held to survive.⁷⁸ Furthermore, a right of action will not, by the general statutory rule, be allowed to abate in so far as the wrong affected a property right or interest and thereby diminished the estate of the deceased sufferer. Thus it has been held that, where plaintiff died pending an action to recover for the loss of services and society of his wife and for expenses of medical attendance, the cause of action, except in so far as it was for the loss of the comfort of her society, would survive his death. Such a case does not come within a statutory exception to survival which covers "injuries to the person of the plaintiff, or to the person of the testator or intestate," though after an amendment which makes it except "injury to the person either of the plaintiff *or of another*" the cause would abate where either party died.⁷⁹ Survival has also been allowed where the tort consisted in overflowing land,⁸⁰ and in obstructing the flow of a stream,⁸¹ or arose out of fraudulent misrepresentations by which a transfer of property was procured.⁸²

⁷⁸ *Vittum v. Gilman*, 48 N. H. 416. And see *Payne's Appeal*, 65 Conn. 397, 32 Atl. 948, 33 L. R. A. 418, 48 Am. St. Rep. 215; *Petts v. Ison*, 11 Ga. 151, 36 Am. Dec. 419; *Houghton v. Butler*, 166 Mass. 547, 44 N. E. 624; *Rabb v. Patterson*, 42 S. C. 528, 20 S. E. 540, 46 Am. St. Rep. 743.

⁷⁹ *Cregin v. Brooklyn Crosstown R. Co.*, 75 N. Y. 192, 31 Am. Rep. 459; *Id.*, 83 N. Y. 595, 38 Am. Rep. 474; *Gorlitzer v. Wolffberg*, 208 N. Y. 475, 102 N. E. 528, Ann. Cas. 1914D, 357. See Decedent Estate Law (Consol. Laws N. Y. 1909, c. 13) §§ 118-120, providing for the survival of actions by or against executors, where personal property has been wasted, destroyed, taken, carried away, or converted, or where a trespass has been committed on real estate, also actions "for wrongs done to the property, rights or interests of another for which an action might be maintained against the wrongdoer," except libel, slander, criminal conversation, seduction, malicious prosecution, assault, battery, or false imprisonment, or other actionable injury to the person either of the plaintiff or of another. But see Code Civ. Proc. N. Y. § 764, providing that an action commenced by a father to recover damages for the seduction of his minor daughter does not abate by his death, but survives to the mother.

⁸⁰ *Ten Eyck v. Runk*, 31 N. J. Law, 428.

⁸¹ *Brown v. Dean*, 123 Mass. 254.

⁸² *Billson v. Linderberg*, 66 Minn. 66, 68 N. W. 771; *Ryxbie v. Wood*, 24 N. Y. 607.

But, even at common law, the death of a party after a verdict had been rendered would not operate as a discontinuance, for the judgment may be considered to relate back to the time of the verdict, and may be entered as of a preceding day or term of the court.⁸³ A similar rule has been provided in many states by statute.⁸⁴

Accord and Satisfaction

"Accord," says Sir William Blackstone, "is a satisfaction agreed upon between the party injuring and the party injured, which, when performed, is a bar to all actions upon this account."⁸⁵ More specifically, the accord is the preliminary agreement to accept something in liquidation of the existing liability, which remains outstanding until the agreement has been executed and satisfaction made.⁸⁶

At the outset we are therefore met with the question whether an accord has been established; i. e., whether there was any agreement that upon the performance of certain conditions the wrongdoer should be discharged. A mere offer upon the latter's part to make compensation will be insufficient to defeat recovery, where acceptance by the party wronged is not shown.⁸⁷

⁸³ *Brown v. Wheeler*, 18 Conn. 199; *Kelly v. Riley*, 106 Mass. 339, 8 Am. Rep. 336; *Chase v. Hodges*, 2 Pa. 48.

⁸⁴ "After verdict, report or decision in an action to recover damages for a personal injury, the action does not abate by the death of a party, but the subsequent proceedings are the same as in a case where the cause of action survives." Code Civ. Proc. N. Y. § 764. But this does not apply to cases of nonsuit directed by the court on trials by jury, since the word "decision" refers only to a determination in actions tried by the court alone. *Corbett v. Twenty-Third St. R. Co.*, 114 N. Y. 579, 21 N. E. 1033.

⁸⁵ Commentaries, book III, p. 15.

⁸⁶ See *Rogers v. City of Spokane*, 9 Wash. 168, 37 Pac. 300; *Kromer v. Helm*, 75 N. Y. 576, 31 Am. Rep. 491.

⁸⁷ Thus, where a cause of action for obstructing a right of way has accrued, any offer on the part of defendant to remove the obstruction cannot defeat plaintiff's recovery for damages received prior to such offer. *McTavish v. Carroll*, 13 Md. 429. To the same effect, *Hensler v. Stix*, 113 Mo. App. 162, 88 S. W. 108; *Gilman v. Noyes*, 57 N. H. 627. For offer to return converted property as a defense to an action of trover. See *infra*, p. 385.

The fact that performance must have taken place should also be emphasized, for an accord executory, without performance accepted, is no bar,⁸⁸ a fact which was well illustrated where, in an action against a municipality to recover damages received through the latter's negligence, the defendant pleaded that plaintiff had agreed to accept a certain sum in full discharge of his claim, and that the city council had directed the issuance of warrants therefor, which were ready for delivery. The plea was insufficient, for the sum had not been paid.⁸⁹

While an accord and satisfaction usually involves the payment of money or the delivery of property,⁹⁰ this is not essential. It may, for instance, consist in the discontinuance of an action which the tort-feasor is bringing against the party wronged,⁹¹ or even the publication of an apology.⁹²

For the purpose of determining whether there was a satisfaction, it is necessary to ascertain exactly what the agreement of the parties was. Thus, as in the cases previously cited, it may have been that the wrongdoer was not to be discharged until the cash was paid, the property delivered, the action discontinued, the apology published, or the act, whatever it was, performed, in which case nothing short of performance will work a satisfaction. On the other hand, the party wronged may have agreed to accept the *promise* of the wrongdoer in lieu of his claim against the latter, and under such conditions, when the promise is given, the plaintiff's original cause of ac-

⁸⁸ Bacon, Abr. tit. "Accord and Satisfaction," C.

⁸⁹ Rogers v. City of Spokane, 9 Wash. 168, 37 Pac. 300. To the same effect, Smith v. Cranford, 84 Hun, 318, 32 N. Y. Supp. 375; Gulf, C. & S. F. Ry. Co. v. Gordon, 70 Tex. 80, 7 S. W. 695.

⁹⁰ Curley v. Harris, 11 Allen (Mass.) 112; Stockton v. Frey, 4 Gill (Md.) 406, 45 Am. Dec. 138.

⁹¹ Thus, where A. and B. have suits for false imprisonment pending against each other, an agreement to discontinue their respective suits, followed by an actual discontinuance, will be a good accord and satisfaction. Foster v. Trull, 12 Johns. (N. Y.) 456.

⁹² It is a good plea to an action for libel that plaintiff and defendant agreed to accept the publication of mutual apologies in satisfaction and discharge of the causes of action, damages, and costs, and that such apologies were published. Boosey v. Wood, 3 H. & C. 484, 11 Jur. N. S. 181, 34 L. J. Exch. 65, 11 L. T. Rep. N. S. 639, 13 Wkly. Rep. 317.

tion may be gone, and he may be remitted to a suit upon the substituted agreement.⁹³

It must appear, moreover, that the payment or other consideration was accepted *in discharge of the wrongdoer's liability*,⁹⁴ and thus, where such payment is made by or consideration moves from a third party, who is not acting as agent of the wrongdoer, nor is a joint tort-feasor with him, it is generally considered that the intent of the parties was not to destroy the claim, though this, after all, is merely a strong presumption, and may be overthrown by evidence to the contrary.⁹⁵ For the same reason the mere fact that the injured party may have been indemnified by insurance will prove no defense to the tort-feasor, either in whole or in part.⁹⁶

It goes without saying that the transaction which it was alleged constitutes an accord and satisfaction must have been entered into voluntarily by the party wronged, and not through fraud, mistake, or duress.⁹⁷ But, if such transaction

⁹³ Plaintiff's cattle were killed through the negligence of defendant, and after a mutual adjustment of damages the latter gave a duebill for the amount. The giving of a duebill will not generally be regarded as satisfaction, but here it was found that it was so accepted by the plaintiff. *Shaw v. Chicago, R. I. & P. Ry. Co.*, 82 Iowa, 199, 47 N. W. 1004. To the same effect, *Ellis v. Bitzer*, 2 Ohio, 89, 15 Am. Dec. 534.

⁹⁴ Voluntary payment of money to an employé injured by the negligence of defendant merely as "wages" during the period of disability does not constitute a satisfaction. *Sobieski v. St. Paul & D. R. Co.*, 41 Minn. 169, 42 N. W. 863. To the same effect, *Hewitt v. Flint & P. M. R. Co.*, 67 Mich. 61, 34 N. W. 659; *Gulf, C. & S. F. Ry. Co. v. Gordon*, 70 Tex. 80, 7 S. W. 695.

⁹⁵ *Western Tube Co. v. Zang*, 85 Ill. App. 63; *Atlantic Dock Co. v. Mayor, etc., of City of New York*, 53 N. Y. 64; *Thomas v. Central R. Co. of New Jersey*, 194 Pa. 511, 45 Atl. 344; *Sieber v. Amunson*, 78 Wis. 679, 47 N. W. 1126. For discharge of joint wrongdoer by release to a co-tort-feasor, see *infra*, p. 124.

⁹⁶ *Western & A. R. R. v. Meigs*, 74 Ga. 857; *Kellogg v. New York Cent. & H. R. R. Co.*, 79 N. Y. 72; *Missouri, K. & T. R. Co. v. Fuller*, 72 Fed. 467, 18 C. C. A. 641, affirmed 168 U. S. 707, 18 Sup. Ct. 944, 42 L. Ed. 1215.

⁹⁷ *Bliss v. New York Cent. & H. R. R. Co.*, 160 Mass. 447, 36 N. E. 65, 39 Am. St. Rep. 504.

is voluntary on his part, the mere fact that the amount which he has received may have been inadequate remuneration for his injury will not invalidate it, for the sufferer will be held bound by his own estimate.⁹⁸ Furthermore, in order that the injured party may attack what is claimed to be an accord and satisfaction, he must restore or offer to restore to the other party whatever has been received, thus putting the latter *in statu quo*.⁹⁹

Release and Covenant Not to Sue

Where the parties have arrived at a settlement of their differences, and the tort-feasor has made satisfaction, it is usual for the injured party to execute and deliver a formal release from all liability,¹⁰⁰ or a covenant not to sue the wrongdoer.¹⁰¹ Though not identical in form, their legal effect is the same when there has been only one tort-feasor. Theoretically a release destroys the claim, while if the sufferer, having given a covenant not to sue, should thereafter bring an action, the wrongdoer could only sue for breach of covenant. Yet to avoid circuitry of action the covenant will under such circumstances be considered a discharge and bar.¹⁰²

⁹⁸ *Hayes v. East Tennessee, V. & G. R. Co.*, 89 Ga. 264, 15 S. E. 361; *Curley v. Harris*, 11 Allen (Mass.) 112.

⁹⁹ *Lyons v. Allen*, 11 App. D. C. 543; *Strodder v. Southern Granite Co.*, 99 Ga. 395, 27 S. E. 174; *Levister v. Southern Ry. Co.*, 56 S. C. 508, 35 S. E. 207.

"Any other [rule] would permit a party to prosecute an action without taking any chances and with means furnished by his adversary—would enable an unscrupulous plaintiff to obtain as large an amount as possible in settlement of his alleged cause of action through negotiation with the defendant, and with the funds thus obtained seek to secure a larger sum in an action brought upon the same cause of action, and without running any risk of losing what he first obtained." *Doyle v. New York, O. & W. R. Co.*, 66 App. Div. 398, 404, 72 N. Y. Supp. 936, 939, per McLennan, J.

¹⁰⁰ *Papke v. G. H. Hammond Co.*, 192 Ill. 631, 61 N. E. 910; *Spitze v. Baltimore & O. R. Co.*, 75 Md. 162, 23 Atl. 307, 32 Am. St. Rep. 378; *Gibson v. Western New York & P. R. R. Co.*, 164 Pa. 142, 30 Atl. 308, 44 Am. St. Rep. 586.

¹⁰¹ *City of Chicago v. Babcock*, 143 Ill. 358, 32 N. E. 271; *Ellis v. Esson*, 50 Wis. 138, 6 N. W. 518, 36 Am. Rep. 830.

¹⁰² *City of Chicago v. Babcock*, *supra*; *Ellis v. Esson*, *supra*.

But where there are several joint tort-feasors, the effect of a release when given to one or more, but not to all, differs from that of a covenant. A release will then operate to discharge all, a rule which seems to be based upon the nature of their liability, which is one and indivisible, and is necessarily destroyed by the discharge of one. Nor will the effect of a release depend upon the validity of the cause of action, and if the claim is made against one, and it is satisfied, all who may be liable are discharged, whether the one released be in fact liable or not. The plaintiff will be estopped to say that he had no claim against the party who settled, but compelled him to buy peace by the settlement of a claim that was groundless, for this would be an allegation of his own wrongful act.¹⁰³ But the covenant not to sue will be given its strict technical meaning, for the rule which, in the case of a single wrongdoer, permits it to be treated as a release to avoid burdening the courts with cross-actions, one on the original liability and the other on the covenant, cannot be fairly applied. Consequently a covenant not to sue one of several joint tort-feasors does not operate to discharge the others from liability.¹⁰⁴

Now we come to a mooted question. Suppose the instrument is in terms a release of less than the entire number of joint tort-feasors, but a right to sue the others is either expressly or by implication reserved. Some of the courts have held that such a reservation is void, as it is repugnant to the legal effect and operation of the release, and consequently the other wrongdoers are discharged.¹⁰⁵ But, on the other hand, authorities of equal weight have said that where it is

¹⁰³ *Tompkins v. Clay St. R. Co.*, 66 Cal. 163, 4 Pac. 1166; *Brown v. City of Cambridge*, 3 Allen (Mass.) 474. And see *Miller v. Beck*, 108 Iowa, 575, 79 N. W. 344.

¹⁰⁴ *Matheson v. O'Kane*, 211 Mass. 91, 97 N. E. 638, 39 L. R. A. (N. S.) 475, Ann. Cas. 1913B, 267; *City of Chicago v. Babcock*, 143 Ill. 358, 32 N. E. 271; *Snow v. Chandler*, 10 N. H. 92, 34 Am. Dec. 140.

¹⁰⁵ *Gunther v. Lee*, 45 Md. 60, 24 Am. Rep. 504; *McBride v. Scott*, 132 Mich. 176, 93 N. W. 243, 61 L. R. A. 445, 102 Am. St. Rep. 416, 1 Ann. Cas. 61; *Ellis v. Bitzer*, 2 Ohio, 89, 15 Am. Dec. 534; *Selther v. Philadelphia Traction Co.*, 125 Pa. 397, 17 Atl. 338, 4 L. R. A. 54, 11 Am. St. Rep. 905; *Abb v. Northern Pac. Ry. Co.*, 28 Wash. 428, 68 Pac. 954, 58 L. R. A. 293, 92 Am. St. Rep. 864.

evident that the consideration paid to the plaintiff was not intended to be full compensation for his injuries, and the agreement signed by him, although in form a release, was clearly intended to preserve the liability of those who were not parties to it, effect will be given to that intention by construing the agreement as in legal effect a covenant not to sue, and not as a technical release.¹⁰⁶

The release and covenant not to sue, like the accord and satisfaction, must, of course, be executed by a competent party. Hence, if the injured party is at the time insane,¹⁰⁷ or in such pain,¹⁰⁸ or under the influence of opiates to such an extent, as to be incapacitated to contract,¹⁰⁹ the agreement is voidable at his election.¹¹⁰ So, too, if the transaction was tainted with fraud,¹¹¹ or was entered into under duress,¹¹² or mistake,¹¹³ or was procured by undue influence.¹¹⁴ But a mere mistake as to the extent of the injuries is not sufficient, where defendant has been guilty of no misrepresentation or has used no artifice to prevent the injured party from

¹⁰⁶ *Edens v. Fletcher*, 79 Kan. 139, 98 Pac. 784, 19 L. R. A. (N. S.) 618; *GILBERT v. FINCH*, 173 N. Y. 455, 66 N. E. 133, 61 L. R. A. 807, 93 Am. St. Rep. 623, Chapin Cas. Torts, 61; *Carey v. Bilby*, 129 Fed. 203, 63 C. C. A. 361; *Duck v. Mayew*, [1892] 2 Q. B. 511, 57 J. P. 23, 62 L. J. Q. B. 69, 67 L. T. Rep. N. S. 547, 4 Repts. 38, 41 Wkly. Rep. 56. And see *Matheson v. O'Kane*, 211 Mass. 91, 97 N. E. 638, 39 L. R. A. (N. S.) 475, Ann. Cas. 1913B, 267.

¹⁰⁷ *Missouri Pac. Ry. Co. v. Brazzil*, 72 Tex. 233, 10 S. W. 403.

¹⁰⁸ *Atchison, T. & S. F. Ry. Co. v. Cunningham*, 59 Kan. 722, 54 Pac. 1055; *Union Pac. Ry. Co. v. Harris*, 158 U. S. 326, 15 Sup. Ct. 843, 39 L. Ed. 1003.

¹⁰⁹ *Chicago, R. I. & P. Ry. Co. v. Lewis*, 109 Ill. 120.

¹¹⁰ In an action for personal injuries, in which a release of plaintiff's claim is pleaded in defense, plaintiff's capacity to execute such release is a question for the jury. *Dixon v. Brooklyn City & N. R. Co.*, 100 N. Y. 170, 3 N. E. 65; *Gibson v. Western New York & P. R. R.*, 164 Pa. 142, 30 Atl. 308, 44 Am. St. Rep. 586.

¹¹¹ *Illinois Cent. R. Co. v. Welch*, 52 Ill. 183, 4 Am. Rep. 593; *Bliss v. New York Cent. & H. R. R. Co.*, 160 Mass. 447, 36 N. E. 65, 39 Am. St. Rep. 504; *Fleming v. Brooklyn Heights R. Co.*, 95 App. Div. 110, 88 N. Y. Supp. 732.

¹¹² *Gulleaume v. Rowe*, 94 N. Y. 268, 46 Am. Rep. 141.

¹¹³ *Bean v. Western N. C. R. Co.*, 107 N. C. 731, 12 S. E. 600; *Lusted v. Chicago & N. W. Ry. Co.*, 71 Wis. 391, 36 N. W. 857.

¹¹⁴ *Stone v. Chicago & W. M. Ry. Co.*, 66 Mich. 76, 33 N. W. 24.

ascertaining their nature,¹¹⁵ and it makes no difference that plaintiff has relied upon the opinion of a physician, if honestly given.¹¹⁶

If plaintiff seeks to defeat the release or covenant, must he offer to restore whatever amount he may have received? The weight of authority appears to be that this is obligatory,¹¹⁷ though it has been intimated that he is not required to do so, and may credit the amount paid towards his recovery.¹¹⁸ But if it appears that the deception was as to the nature of the instrument, as, for instance, that a cause of action was included in the release contrary to plaintiff's intent,¹¹⁹ or that the release was represented to be a receipt for wages,¹²⁰ or for a mere gratuity,¹²¹ an offer to return will be unnecessary. Plaintiff "is not attempting to avoid a

And see *Bussian v. Milwaukee, L. S. & W. Ry. Co.*, 56 Wis. 325, 14 N. W. 452.

¹¹⁵ *Homuth v. Metropolitan St. Ry. Co.*, 129 Mo. 629, 31 S. W. 903; *Kane v. Chester Traction Co.*, 186 Pa. 145, 40 Atl. 320, 65 Am. St. Rep. 846. But it will be otherwise where defendant fraudulently misrepresents the opinion of the physician. *Fleming v. Brooklyn Heights R. Co.*, 95 App. Div. 110, 88 N. Y. Supp. 732.

¹¹⁶ *Nason v. Chicago, R. I. & P. Ry. Co.*, 140 Iowa, 533, 118 N. W. 751.

¹¹⁷ *Kelly v. Louisville & N. R. Co.*, 154 Ala. 573, 45 South. 906; *Harley v. Riverside Mills*, 129 Ga. 214, 58 S. E. 711; *Valley v. Boston & M. R. Co.*, 103 Me. 106, 68 Atl. 635; *Drohan v. Lake Shore & M. S. Ry. Co.*, 162 Mass. 435, 38 N. E. 1116; *Och v. Missouri, K. & T. Ry. Co.*, 130 Mo. 27, 31 S. W. 962, 36 L. R. A. 442; *Shaw v. Delaware, L. & W. R. Co.*, 126 App. Div. 210, 110 N. Y. Supp. 362.

¹¹⁸ *O'Brien v. Chicago, M. & St. P. Ry. Co.*, 89 Iowa, 644, 57 N. W. 425; *Missouri Pac. Ry. Co. v. Goodholm*, 61 Kan. 758, 60 Pac. 1066; *Jones v. Alabama & V. Ry. Co.*, 72 Miss. 22, 16 South. 379.

¹¹⁹ Plaintiff here "is not seeking to disaffirm the agreement actually made, but merely objecting to the application of the written evidence of it to a subject which the parties did not intend to include in it." *Kirchner v. New Home Sewing Mach. Co.*, 135 N. Y. 182, 190, 31 N. E. 1104, 1107, per Maynard, J.

¹²⁰ *Herman v. P. H. Fitzgibbons Boiler Co.*, 136 App. Div. 286, 120 N. Y. Supp. 1074; *Bjorklund v. Seattle Electric Co.*, 35 Wash. 439, 77 Pac. 727, 1 Ann. Cas. 443.

¹²¹ *Roberts v. Colorado Springs & I. Ry. Co.*, 45 Colo. 188, 101 Pac. 59; *Mullen v. Old Colony R. Co.*, 127 Mass. 86, 34 Am. Rep. 349; *Cleary v. Municipal Electric Light Co.*, 65 Hun, 621, 19 N. Y. Supp. 951, affirmed 139 N. Y. 643, 35 N. E. 206.

contract which he has made, but is showing that he did not make the contract which he apparently made." ¹²²

Furthermore, the injured party, upon discovering the fraud or mistake, must disaffirm with reasonable promptness; for otherwise he will be deemed to have elected to abide by the settlement. ¹²³

Statute of Limitations

By the common law there was no stated or fixed period for the bringing of suits. A man might bring his action at any time. ¹²⁴ "In the progress of society, however, it was soon found necessary to supply this deficiency by statute, and to compel men to prosecute their rights within a reasonable time, or to abandon them forever. Hence we find from the reign of Henry I a succession of statutes narrowing the latitude of the common law in this respect," ¹²⁵ finally culminating in St. 21 James I, c. 16. ¹²⁶

Torts were divided into three classes, as follows: "Six years, trespass to lands and goods, conversion, and all other common-law wrongs, including libel, except slander by words

¹²² *Mullen v. Old Colony R. Co.*, 127 Mass. 90, 84 Am. Rep. 349, per Soule, J.

¹²³ *Lewless v. Detroit, G. H. & M. Ry. Co.*, 65 Mich. 292, 32 N. W. 790; *Galveston, H. & S. A. Ry. Co. v. Cade*, 100 Tex. 37, 94 S. W. 219; *Chicago, St. P. & K. C. Ry. Co. v. Pierce*, 64 Fed. 293, 12 C. C. A. 110.

¹²⁴ *Blackmore v. Tiddlerley*, 2 Ld. Raym. 1099; *People v. Gilbert*, 18 Johns. (N. Y.) 227; *Cray v. Hartford Fire Ins. Co.*, Fed. Cas. No. 3,375.

¹²⁵ *Buchanan v. Rowland*, 5 N. J. Law, 721, 729, per Kirkpatrick, C. J.

¹²⁶ "Those statutes previous to this one, having been sometimes temporary, were always contracted as to their field of operation and extremely crude; and they generally run back to some remarkable fixed period, such as the Last Return of King John from Ireland or to the First Coronation of Richard I, whereby the period increased every day, and, in the language of Lord Coke, 'many suits, troubles and inconveniences did arise, and therefore a more direct and commodious course was taken, which was to endure forever, and calculated so to impose diligence on and vigilance in him that was to bring his action, so that by one constant law certain limitations might serve both for the time present and for all time to come.'" *Brian v. Tims*, 10 Ark. 597, 601, per Scott, J.

actionable per se and injuries to the person; four years, injuries to the person, including imprisonment; two years, slander by words actionable per se.¹²⁷ Persons who, at the time their cause of action accrued, were under the disability of infancy, coverture, insanity, imprisonment, or absence beyond the seas, were exempted from the bar of the statute, "so as they take the same [action] within such times as are before limited after their coming to or being of full age, discover, of sane memory, at large and returned from beyond the seas, as other persons having no such impediment should have done."¹²⁸ A similar provision covering cases where the wrongdoer shall have been beyond seas at the time the cause of action accrued was enacted by St. 4 & 5 Anne, c. 3, § 16.

While the statute of James has served as a model for American legislation, the latter is by no means uniform, and, since a detailed statement is impossible within the compass of this work, resort must be had to the statutes themselves.¹²⁹

It will be noted that the injured party must be under the disability when his cause of action first accrued. Where he is competent at that time, the fact that subsequently he becomes disabled will not stop the operation of the act, in the absence of special statutory exception. Hence, if he was free from disability at the time when the injury occurred, but

¹²⁷ Pollock on Torts (8th Ed.) p. 210.

¹²⁸ St. 21 James I, c. 16, § 7.

But imprisonment and absence beyond seas were removed from among the disabilities by the amendatory statute of 19 and 20 Vict. c. 97, § 10, and the disability of coverture no longer exists since the Married Woman's Property Act of 1882, 45 and 46 Vict. c. 75.

¹²⁹ For example, in New York the following periods have been fixed: Six years, injury to property or personal injury, except where otherwise expressly prescribed, and actions to recover a chattel (Code Civ. Proc. § 382, subds. 3 and 4); three years, personal injury resulting from negligence (Id. § 383, subd. 5); two years, libel, slander, assault, battery, seduction, criminal conversation, false imprisonment, malicious prosecution, malpractice (Id. § 384, subd. 1). For exemptions for disability, see Id., §§ 396, 401; *Hyland v. New York Cent. & H. R. R. Co.*, 24 App. Div. 417, 48 N. Y. Supp. 416.

thereafter became insane,¹³⁰ or was imprisoned,¹³¹ the statute, having begun to run at the time of the injury, will not stop.¹³² If there are several co-existing disabilities in the same person at the time the right of action accrues, he is not required to sue, in order to avoid the operation of the statute, until all are removed. But it is essential that they should co-exist, for a disability subsequently accruing cannot be added to the first, whether the second arose while or after the first was operative,¹³³ since, "if disability could be added to disability, claims might be protracted to an indefinite extent of time."¹³⁴

The statute, as has been seen, starts to run from the time when the cause of action accrues; i. e., from the instant that the injured party has a right to apply for relief. Now, keeping in mind what has been already said concerning the necessity of establishing damage,¹³⁵ it becomes evident that a line must be drawn between cases where the cause of action is complete in itself, though it may be impossible to establish the existence of actual damage, there having been an invasion of a legal right, and cases where actual damage must have resulted, in order that an action may be maintainable. In the former, the statute begins with the commission of the wrongful act, as, for example, assault and battery,¹³⁶ trespass to land,¹³⁷ and the wrongful seizure of personal prop-

¹³⁰ *Calumet Electric St. Ry. Co. v. Mable*, 66 Ill. App. 235; *McCutchen v. Currier*, 94 Me. 362, 47 Atl. 923.

¹³¹ *Kistler v. Hereth*, 75 Ind. 177, 39 Am. St. Rep. 131; *McDonald v. Hovey*, 110 U. S. 619, 4 Sup. Ct. 142, 28 L. Ed. 269.

¹³² See Code Civ. Proc. N. Y. § 408.

¹³³ *Scott v. Haddock*, 11 Ga. 258; *Butler v. Howe*, 13 Me. 397; *Eager v. Commonwealth*, 4 Mass. 182; *Gaines v. Hammond's Adm'r* (C. C.) 6 Fed. 449, 2 McCrary, 432, affirmed 111 U. S. 395, 4 Sup. Ct. 426, 28 L. Ed. 466. And see Code Civ. Proc. N. Y. § 409.

¹³⁴ *Demarest v. Wynkoop*, 3 Johns. Ch. (N. Y.) 129, 139, 8 Am. Dec. 467, per Kent, Ch.

¹³⁵ See *supra*, p. 69 et seq.

¹³⁶ See *Kansas Pac. Ry. Co. v. Muhlman*, 17 Kan. 224, 228.

¹³⁷ *Hunter v. Burlington, C. R. & N. Ry. Co.*, 84 Iowa, 605, 51 N. W. 64; *Kansas Pac. Ry. Co. v. Muhlman*, 17 Kan. 224; *Williams v. Pomeroy Coal Co.*, 37 Ohio St. 583. "The fact that plaintiff only

erty.¹³⁸ As an action for malicious prosecution cannot be brought, unless and until the proceedings complained of have terminated, the statute of limitations will begin only upon such termination.¹³⁹ But a cause of action for false imprisonment is complete as soon as the imprisonment ceases, as where the plaintiff, having been arrested, gives a bond and is released, though the proceedings on which the arrest was made have not been terminated.¹⁴⁰

When the wrong consists in the unlawful exercise of dominion over the goods of another, which constitutes the tort conversion, it will be found¹⁴¹ that the cause of action is sometimes not complete until the owner has demanded his property of the person having possession, as where such possession was lawfully obtained, and the exercise of dominion consists in its unlawful detention. Under such circumstances the statute will run from the time of the demand and refusal.¹⁴² On the other hand, where demand is not essential, then it will start whenever the right to sue is complete, as where the original taking was unlawful,¹⁴³ or there has been a distinct act of dominion, such as the disposal of the property, though the original taking was lawful.¹⁴⁴

We now come to cases where proof of damage is essential, and here the cause of action will be complete, and the statute will begin to run, only when such damage occurs.¹⁴⁵

recently discovered who did the wrong makes no difference." *Gale v. McDaniel*, 72 Cal. 334, 13 Pac. 871.

¹³⁸ *Wood v. Currey*, 57 Cal. 208; *Read v. Markle*, 3 Johns. (N. Y.) 523.

¹³⁹ *Carnes v. Atkins Bros. Co.*, 123 La. 26, 48 South. 572; *Printup v. Smith*, 74 Ga. 157, *Hackler v. Miller*, 79 Neb. 209, 114 N. W. 274.

¹⁴⁰ *Dusenbury v. Kelley*, 85 N. Y. 383, 61 How. Prac. (N. Y.) 408, affirming 8 Daly (N. Y.) 537, 58 How. Prac. (N. Y.) 286.

¹⁴¹ See *infra*, p. 379.

¹⁴² *Reizenstein v. Marquardt*, 75 Iowa, 294, 39 N. W. 506, 1 L. R. A. 318, 9 Am. St. Rep. 477; *Haire v. Miller*, 49 Kan. 270, 30 Pac. 482; *Roberts v. Berdell*, 61 Barb. (N. Y.) 37, affirmed 52 N. Y. 644; *Shuffler v. Turner*, 111 N. C. 297, 16 S. E. 417.

¹⁴³ *Schroeppel v. Corning*, 5 Denio (N. Y.) 236.

¹⁴⁴ *Bell v. Bank of California*, 153 Cal. 234, 94 Pac. 889; *Kelsey v. Griswold*, 6 Barb. (N. Y.) 436; *Granger v. George*, 5 Barn. & C. 149.

¹⁴⁵ *Bank of Hartford County v. Waterman*, 26 Conn. 324; *How-*

Thus, where mines were worked by one who left insufficient support for the upper soil, by reason of which a house situated over the mines sank some time after the latter had ceased to be worked, it was held that the statute began to run from the sinking of the house, and not from the time of the working.¹⁴⁶ A similar rule is applied where one excavates soil upon his own premises, and thereby removes the natural support of his neighbor's land, so that it falls.¹⁴⁷ Of this character, also, is the ordinary action for negligence. It matters not how long the omission to exercise the proper degree of care may have continued, there is no cause of action until injury is received, and from that time only will the statute run.¹⁴⁸

The tort defamation belongs in both classes. Where the charge is of so grave a nature that damage will be presumed to have resulted from its publication, the cause of action is complete in itself, and with the publication, the statute will start. If, however, it is of such a character that damage is not inferred, but must be shown, then the cause of action dates from the occurrence of the damage.¹⁴⁹

ard County v. Chicago & A. R. Co., 130 Mo. 652, 32 S. W. 651; *Henry v. Ohio River R. Co.*, 40 W. Va. 234, 21 S. E. 863.

¹⁴⁶ *Backhouse v. Bonomi*, 9 H. L. Cas. 503, 7 Jur. N. S. 809, 34 L. J. Q. B. 181, 4 L. T. Rep. N. S. 754, 9 Wkly. Rep. 769, 11 Eng. Repr. 825.

¹⁴⁷ *Ludlow v. Hudson River R. Co.*, 6 Lans. (N. Y.) 128.

¹⁴⁸ Thus, where a bridge was constructed of unsafe materials and had been maintained for some time prior to the occurrence of plaintiff's injury, the statute of limitations will run from the date of the injury, and not from the time the negligence began. *Board of Com'rs of Wabash County v. Pearson*, 120 Ind. 426, 22 N. E. 134, 18 Am. St. Rep. 325. To the same effect, *Mayor, etc., of City of Huntsville v. Ewing*, 116 Ala. 576, 22 South. 984; *Leroy v. City of Springfield*, 81 Ill. 114. The fact that the injured party did not recover for some time will not extend the time for bringing the action. *Piller v. Southern Pac. R. Co.*, 52 Cal. 42.

¹⁴⁹ *Saunders v. Edwards*, 1 Sid. 95. And see opinion of Lord Cranworth in *Backhouse v. Bonomi*, 9 H. L. Cas. 503, 512, 7 Jur. N. S. 809, 34 L. J. Q. B. 181, 4 L. T. Rep. N. S. 754, 8 Wkly. Rep. 769, 11 Eng. Repr. 825.

CHAPTER V

GENERAL PRINCIPLES (CONTINUED)—PARTIES

- 38. The Party Wronged.
- 39. The Wrongdoer—Several Liability—Personal Culpability.
- 40. Public Officers in General.
- 41. Judicial and Discretionary Acts.
- 42. Ministerial Acts.
- 43. Infants.
- 44. Insane Persons.
- 45. Husband and Wife.
- 46. Servants and Agents.
- 47. Masters.
- 48. Assumption of Risk.

THE PARTY WRONGED

38. Though the party whose legal right has been invaded will be entitled to redress, his power to transfer his cause of action will depend upon the nature of the injury and is in general restricted to wrongs done to property rights.

The Sufferer

Assuming that there has been the violation of a legal right and that the existence of damage has been proven in cases where such proof is required, the law will then, of course, supply a remedy to the injured party. It matters not that the sufferer may, for many purposes, labor under a disqualification, as in the case of an infant,¹ or an insane person.² He may sue

¹ Estate of Cahill, 74 Cal. 52, 15 Pac. 364; Bloomingdale v. Chittenden, 74 Mich. 698, 42 N. W. 166; Clasen v. Pruhs, 69 Neb. 278, 95 N. W. 640, 5 Ann. Cas. 112; Code Civ. Proc. N. Y. §§ 468-470. Recovery denied for negligence causing injury (Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N. E. 638, 48 L. R. A. 225, 75 Am. St. Rep. 176), or death (Dietrich v. Northampton, 138 Mass. 14, 52 Am. Rep. 242)

² Reese v. Reese, 89 Ga. 645, 15 S. E. 846; Smith v. Smith, 106 N. C. 498, 11 S. E. 188; Code Civ. Proc. N. Y. § 2340.

through his guardian, next friend, or committee. This assumes, of course, that the party *has* a cause of action. For instance, it has been held that a child may not recover damages from a parent for personal injuries inflicted by the latter during the infant's minority, the reason being that "the peace of society and of the families composing society, and a sound public policy, designed to subserve the repose of families and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent."³

The common-law status of a feme covert was somewhat peculiar. Husband and wife were one, and it has sometimes been observed that that one was the husband. Both were required to be joined as plaintiffs in actions for injuries to her person,⁴ and in certain cases of defamation.⁵ Actions to recover possession of her real property were subject to this rule,⁶ as were those for injuries to her personal property where the cause of action was complete prior to coverture.⁷ On the other hand, since the personal property of the wife vested in the husband, he alone could sue to recover it, or for injuries thereto committed during

after birth. Allowed posthumous child for father's death. *Nelson v. Galveston, H. & S. A. Ry. Co.*, 78 Tex. 621, 14 S. W. 1021, 22 Am. St. Rep. 81, 11 L. R. A. 391. Allowed for liquor sold parent of a child then unborn. *State v. Soale*, 36 Ind. App. 73, 74 N. E. 1111; *Phair v. Dumond*, 99 Neb. 310, 156 N. W. 637. Intimated in *Nugent v. Brooklyn Heights R. Co.*, 154 App. Div. 667, 139 N. Y. Supp. 367, that action might lie, though recovery denied as relation of carrier and passenger existed only between mother and defendant.

³ *Hewlett v. George*, 68 Miss. 703, 711, 9 South. 885, 13 L. R. A. 682, per Woods, J.; *McKelvey v. McKelvey*, 111 Tenn. 388, 77 S. W. 664, 64 L. R. A. 991, 102 Am. St. Rep. 787, 1 Ann. Cas. 130.

⁴ *Long v. Morrison*, 14 Ind. 595, 77 Am. Dec. 72; *Sanford v. Augusta*, 32 Me. 536; *Treusch v. Kamke*, 63 Md. 278; Schouler on Domestic Relations, § 77.

⁵ I. e., where the words were actionable without proof of special damage. Joinder was unnecessary where special damage must be shown. *Beach v. Ranney*, 2 Hill (N. Y.) 309; *Gibson v. Gibson*, 43 Wis. 23, 28 Am. Rep. 527.

⁶ *Atkinson v. Rittenhouse*, 5 Pa. 103; *Westcott v. Miller*, 42 Wis. 454.

⁷ *Milner v. Milnes*, 3 T. R. 627.

the marriage,⁸ while joinder was optional in actions for injuries to the wife's realty during coverture.⁹ By reason of their identity each was precluded from maintaining an action of tort against the other,¹⁰ and a subsequent divorce made no difference where the wrong had been committed during coverture.¹¹

To ascertain the extent to which these rules have been repealed or modified, it will be necessary to examine the various Married Woman's Acts. Generally speaking it may be said that the feme covert may now sue as if sole,¹² whether the action be to recover for personal injuries,¹³ for defamation,¹⁴ or concerns her separate property.¹⁵ While considerable liberality has been displayed, it has been held

⁸ *George v. English*, 30 Ala. 582; *Gerry v. Gerry*, 11 Gray (77 Mass.) 381; *McCormick v. Pennsylvania Cent. R. Co.*, 49 N. Y. 303.

⁹ *Tallmadge v. Grannis*, 20 Conn. 296. Contra, if the action was for waste. *Thacher v. Phinney*, 7 Allen (89 Mass.) 146.

¹⁰ *Abbott v. Abbott*, 67 Me. 304, 24 Am. Rep. 27; *Schultz v. Schultz*, 89 N. Y. 644; *Phillips v. Barnet*, 1 Q. B. D. 436, 45 L. J. Q. B. 277, 34 L. T. Rep. N. S. 177, 24 Wkly. Rep. 345.

¹¹ *Strom v. Strom*, 98 Minn. 427, 107 N. W. 1047, 6 L. R. A. (N. S.) 191, 116 Am. St. Rep. 387; *Phillips v. Barnet*, 1 Q. B. D. 436, 45 L. J. Q. B. 277, 34 L. T. Rep. N. S. 177, 24 Wkly. Rep. 345.

¹² "In an action or special proceeding, a married woman appears, prosecutes or defends alone or joined with other parties as if she was single. It is not necessary or proper to join her husband with her as a party in any action or special proceeding affecting her separate property. The husband is not a necessary or proper party to an action or special proceeding to recover damages to the person, estate or character of his wife." Code Civ. Proc. N. Y. § 450; and see Consol. Laws N. Y. 1909, c. 14 (Domestic Relations Laws) §§ 51, 57.

¹³ *Chicago, B. & Q. R. Co. v. Dunn*, 52 Ill. 260, 4 Am. Rep. 606; *McGovern v. Interurban R. Co.*, 136 Iowa, 13, 111 N. W. 412, 13 L. R. A. (N. S.) 476, 125 Am. St. Rep. 215; *Duffee v. Boston El. R. Co.*, 191 Mass. 563, 77 N. E. 1036; *McLimans v. City of Lancaster*, 63 Wis. 596, 23 N. W. 689; *Weldon v. Winslow*, 13 Q. B. D. 784, 53 L. J. Q. B. 528, 51 L. T. Rep. N. S. 643, 33 Wkly. Rep. 219.

¹⁴ *Pavlovski v. Thornton*, 89 Ga. 829, 15 S. E. 822; *Story v. Downey*, 62 Vt. 243, 20 Atl. 321.

¹⁵ *City of Chicago v. McGraw*, 75 Ill. 566; *Read v. Earle*, 12 Gray (78 Mass.) 423; *Van Cleve v. Rook*, 40 N. J. Law, 25; *Draper v. Stouvenel*, 35 N. Y. 507; *Norfolk & W. R. Co. v. Dougherty*, 92 Va. 372, 23 S. E. 777; *Weldon v. De Bathe*, 14 Q. B. D. 339, 54 L. J. Q. B. 113, 53 L. T. Rep. N. S. 520, 33 Wkly. Rep. 328.

that a statute giving general capacity to sue and to be sued will not completely destroy the common-law doctrine of identity, and consequently will not confer upon her the power to sue the husband for the latter's torts, in the absence of an express provision to that effect.¹⁶

Passing from the individual to the corporation, we find the latter to be upon the same plane. "Corporations, like individuals, constantly maintain actions, the object of which is the recovery of damages for wrongs done to them,"¹⁷ as in cases of trespass,¹⁸ libel,¹⁹ conspiracy,²⁰ and nuisance.²¹

So, too, the United States as a corporation or body politic is entitled to seek the protection of its property in the state courts or in its own tribunals.²² It may, for instance, sue and recover for trespass upon the public domain and the cutting of timber thereon,²³ for the conversion of its

¹⁶ Thus a wife cannot sue her husband for assault and battery. *Peters v. Peters*, 42 Iowa, 182; *Strom v. Strom*, 98 Minn. 427, 107 N. W. 1047, 6 L. R. A. (N. S.) 191, 116 Am. St. Rep. 387; *Abbe v. Abbe*, 22 App. Div. 483, 48 N. Y. Supp. 25; *Lillenkamp v. Rippetoe*, 133 Tenn. 57, 179 S. W. 628, L. R. A. 1916B, 881. Contra, *Brown v. Brown*, 88 Conn. 42, 89 Atl. 889, 52 L. R. A. (N. S.) 185, Ann. Cas. 1915D, 70; *Gilman v. Gilman* (N. H. 1915) 95 Atl. 657, L. R. A. 1916B, 907. She may, however, under the New York statute, sue her husband to enforce her property rights; e. g., by an action of ejectment. *Wood v. Wood*, 83 N. Y. 575. And in Wisconsin the husband has been permitted to sue the wife in replevin. *Carney v. Gleissner*, 62 Wis. 493, 22 N. W. 735.

¹⁷ 6 Thompson, Corp. § 7383.

¹⁸ *Second Congregational Soc. in North Bridgewater v. Waring*, 24 Pick. (Mass.) 304.

¹⁹ *Hahnemannian Life Ins. Co. v. Beebe*, 48 Ill. 87, 95 Am. Dec. 519; *Trenton Mut. Life & Fire Ins. Co. v. Perrine*, 23 N. J. Law, 402, 57 Am. Dec. 400; *Knickerbocker Life Ins. Co. v. Ecclesine*, 34 N. Y. Super. Ct. 76, 11 Abb. Prac. (N. S.) 385, 42 How. Prac. 201.

²⁰ *Ilion Bank v. Carver*, 31 Barb. (N. Y.) 230.

²¹ *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 2 Sup. Ct. 719, 27 L. Ed. 739.

²² *Cotton v. U. S.*, 11 How. 229, 13 L. Ed. 675; *U. S. v. Holmes* (C. C.) 105 Fed. 41.

²³ *Cotton v. U. S.*, 11 How. 229, 13 L. Ed. 675.

personal property,²⁴ or for money obtained through a fraudulent claim,²⁵ and may restrain pasturage upon reserved forest lands.²⁶ A like power exists in the states²⁷ and their political subdivisions.²⁸

The Assignee

Hitherto there have been considered cases where the injury had been inflicted upon the individual who is before the court as plaintiff. But the claim may have been assigned, though it is not every right of action in tort which is capable of transfer. It has been well said that: "The ancient doctrine was that a demand arising out of a tort was not assignable, but the modern cases restrict the principle to torts against the person, or to such as did not survive to the personal representative after death; such, for instance, as slander, assault and battery, seduction, and the like. Torts to property, on the other hand, whereby the estate of a party is destroyed or diminished, are now held assignable either by the act of the party or by general assignments by operation of law, and the doctrine is recognized both in England and America."²⁹

It being the general rule, therefore, that only such causes of action may be assigned as are permitted to survive, what has been said concerning abatement by death³⁰ will apply. Thus a right to recover for personal injuries has been held

²⁴ *E. E. Bolles Wooden Ware Co. v. U. S.*, 106 U. S. 432, 1 Sup. Ct. 398, 27 L. Ed. 230.

²⁵ *Pooler v. U. S.*, 127 Fed. 519, 62 C. C. A. 317.

²⁶ *U. S. v. Tygh Valley Land & Live Stock Co.* (C. C.) 76 Fed. 693.

²⁷ *Kansas v. Colorado*, 185 U. S. 125, 22 Sup. Ct. 552, 46 L. Ed. 838; *Missouri v. Illinois*, 180 U. S. 208, 21 Sup. Ct. 331, 45 L. Ed. 497.

²⁸ *Kensington Com'rs v. Philadelphia County*, 13 Pa. 76; *City of Milwaukee v. Herman Zoehrlaut Leather Co.*, 114 Wis. 276, 90 N. W. 187.

²⁹ *Chicago, St. L. & N. O. R. Co. v. Packwood*, 59 Miss. 280, 282, per Chalmers, C. J., and see *North Chicago St. R. Co. v. Ackley*, 171 Ill. 100, 49 N. E. 222, 44 L. R. A. 177.

³⁰ See *supra*, p. 117 et seq.

not transferable;³¹ nor is one for false imprisonment,³² nor for defamation.³³ On the other hand, if the wrong consists in an injury to property rights, the chose in action is subject to assignment.³⁴ As has been seen, some causes of action which did not survive at common law have been made descendible by legislation. But such a statute will not operate by implication to confer assignability.³⁵

THE WRONGDOER—SEVERAL LIABILITY

39. Legal responsibility for a tort may arise out of—

- (a) The personal act or omission of the defendant; or—
- (b) The act or omission of some third person for whose conduct the defendant is held accountable.

Under the first head there will be discussed the liability of—

- (1) Public officers;
- (2) Infants;
- (3) Insane persons;
- (4) Husband and Wife;
- (5) Servants and Agents.

Under the second head that of—

- (6) The state;
- (7) Corporations;
- (8) Employers;
- (9) Partners;
- (10) Owners.

³¹ *Averill v. Longfellow*, 66 Me. 237; *Linton v. Hurley*, 104 Mass. 353; *Pulver v. Harris*, 52 N. Y. 73; *Weller v. Jersey City, H. & P. St. R. Co.*, 68 N. J. Eq. 659, 61 Atl. 459, 6 Ann. Cas. 442; *Boogren v. St. Paul City Ry. Co.*, 97 Minn. 51, 106 N. W. 104, 3 L. R. A. (N. S.) 379, 114 Am. St. Rep. 691. Contra, *Kithcart v. Kithcart*, 145 Iowa, 549, 124 N. W. 305, 30 L. R. A. (N. S.) 1062.

³² *Hunt v. Conrad*, 47 Minn. 557, 50 N. W. 614, 14 L. R. A. 512.

³³ *Miller v. Newell*, 20 S. C. 123, 47 Am. Rep. 833.

³⁴ *Whitaker v. Gavit*, 18 Conn. 522; *Fulton Fire Ins. Co. v. Bald-*

³⁵ See note 35 on following page.

PUBLIC OFFICERS—IN GENERAL

40. Where the defense of "act of state" cannot be interposed successfully, the public officer is in general responsible for acts not judicial in their nature, which constitute the violation of a duty owing to the individual damnified.

If the conduct of a public officer amounts to an act of state, then, as has been seen,³⁶ no personal responsibility can arise therefrom, nor can the state itself, being superior to the law, be held liable in any event, except by its own consent.³⁷ But for other acts, and subject to what shall hereafter be said, the rule can be laid down that no immunity will attach merely by virtue of official position, nor can the inviolability of the state itself be invoked for the protection of the actor. Thus the sergeant at arms of the House of Representatives, who, under a warrant from the Speaker, which the latter lacked authority to issue, had arrested a recalcitrant witness summoned before a committee of investigation and caused him to be confined, was held liable in an action for false imprisonment,³⁸ and the defendant's responsibility was likewise declared in an action against the commandant of a United States navy yard who had unlawfully manufactured and used there certain caisson gates in violation of plaintiff's patent rights, though in so doing he had acted under orders.³⁹ Nor will it be a

win, 37 N. Y. 648; *Holmes v. Loud*, 149 Mich. 410, 112 N. W. 1109; *Chicago, St. L. & N. O. R. Co. v. Packwood*, 59 Miss. 280; *McArthur v. Green Bay & M. Canal Co.*, 34 Wis. 139.

³⁶ *Weller v. Jersey City, H. & P. St. R. Co.*, 68 N. J. Eq. 659, 61 Atl. 459, 6 Ann. Cas. 442.

³⁷ See *supra*, p. 107.

³⁸ See *infra*, p. 196.

³⁹ *Kilbourn v. Thompson*, 103 U. S. 168, 26 L. Ed. 377.

⁴⁰ *Belknap v. Schild*, 161 U. S. 10, 16 Sup. Ct. 443, 40 L. Ed. 599. To the same effect, *The Flying Fish* (*Little v. Barreme*) 2 Cranch, 170, 2 L. Ed. 243 (seizure of a vessel); *Bates v. Clark*, 95 U. S. 204, 24 L. Ed. 471 (seizure of liquors). "No man in this country is so

defense that he acted under a statute, if the latter is found to be unconstitutional, since, being void, no power or jurisdiction could be derived from it. Inability to forecast the ultimate decision as to its constitutionality will not avail him.⁴⁰ If the statute is valid, the officer is of course protected where he acted within the lines of his duty and in a proper manner.⁴¹ But where his conduct is *prima facie* unlawful the burden rests upon him of proving the existence of facts which justify his action. Thus where an act authorizes the summary killing of animals having the glanders, and the officer causes a healthy horse to be killed under a misapprehension, he will be responsible.⁴²

Furthermore the duty violated must not have been due

high that he is above the law. * * * All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it. * * * Shall it be said in the face of all this, and of the acknowledged right of the judiciary to decide, in proper cases, statutes which have been passed by both branches of Congress and approved by the President to be unconstitutional, that the courts cannot give a remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the government without lawful authority, without process of law, and without compensation because the President has ordered it and his officers are in possession. If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty and the protection of personal rights." *U. S. v. Lee*, 106 U. S. 196, 220, 1 Sup. Ct. 240, 27 L. Ed. 171, per Miller, J.

⁴⁰ *Sumner v. Beeler*, 50 Ind. 341, 19 Am. Rep. 718; *Kelly v. Bemis*, 4 Gray (70 Mass.) 83, 64 Am. Dec. 50. It is quite conceivable that "it may devolve upon the officer a vast responsibility in some cases." *Campbell v. Sherman*, 35 Wis. 103, 110. It requires him to decide at his peril; for, if he refuses to act because he believes a valid statute to be unconstitutional, he will likewise be liable to the party aggrieved. *Clark v. Miller*, 54 N. Y. 528. But the doctrine announced in the text does not appear to have met with universal favor. *Henke v. McCord*, 55 Iowa, 378, 7 N. W. 623; *Shafford v. Brown*, 49 Wash. 307, 95 Pac. 270.

⁴¹ *Thibodaux v. Town of Thibodaux*, 46 La. Ann. 1528, 16 South. 450; *Highway Com'rs v. Ely*, 34 Mich. 173, 19 N. W. 940; *Hager v. Danforth*, 20 Barb. (N. Y.) 16; unless the act was done maliciously, *Burton v. Fulton*, 49 Pa. 151.

⁴² *Miller v. Horton*, 152 Mass. 540, 26 N. E. 100, 10 L. R. A. 116, 23 Am. St. Rep. 850.

solely to the public as such. "The failure of a public officer to perform a public duty can constitute an individual wrong only when some person can show that in the public duty was involved also a duty to himself as an individual and that he has suffered a special and peculiar injury by reason of its nonperformance."⁴³ Hence no action lies by a mortgagee for the omission of a county treasurer to make taxes assessed against the mortgagor out of personal property, though the indirect effect is that the burdens upon the mortgaged land are increased and the value of the security lessened.⁴⁴ Nor is the failure properly to list property for taxation a wrong to an individual whose own assessments are not shown to be made thereby a larger proportion of the aggregate taxable property than they should have been.⁴⁵

Assuming, however, that what would ordinarily be regarded as an actionable wrong has occurred, special immunity may be extended from motives of public policy. Freedom in the exercise of legislative functions being essential, members of Congress are not to be questioned elsewhere "for any speech or debate in either House";⁴⁶ and a similar provision protecting the local Legislature is generally found in the state Constitutions.⁴⁷ It was for this reason that, although the sergeant at arms in the Kilbourn Case, already referred to, was held responsible, the members of the investigating committee, who had reported to the House the witness' delinquency and voted in favor of the resolution under which he was committed, were exonerated.⁴⁸

⁴³ *Gage v. Springer*, 211 Ill. 200, 204, 71 N. E. 860, 103 Am. St. Rep. 191, per Scott, J.

⁴⁴ *State ex rel. Travelers' Ins. Co. v. Harris*, 89 Ind. 363, 46 Am. Rep. 169.

⁴⁵ *Moss v. Cummings*, 44 Mich. 359, 6 N. W. 843. To the same effect, *Harrington v. Ward*, 9 Mass. 251; *Kahl v. Love*, 37 N. J. Law, 5; *Houseman v. Girard Mut. Bldg. & Loan Ass'n*, 81 Pa. 256. The principle in its general aspect has already been discussed. See *supra*, p. 85 et seq.

⁴⁶ Const. U. S. art. 1, § 6.

⁴⁷ See Const. N. Y. art. 3, § 12.

⁴⁸ *Kilbourn v. Thompson*, 103 U. S. 168, 26 L. Ed. 377. This de-

Another exemption exists where it is shown that the public officer has failed to perform or has improperly exercised functions which are judicial in their nature. This is not confined to judges, but includes all cases where the officer is called upon to use discretion and judgment in the exercise or withholding of his powers "according to his own view of what is necessary and proper."⁴⁹ Opposed thereto are ministerial duties, so called, required to be performed by the officer under given conditions and in a prescribed manner, "without regard to the exercise of his own judgment upon the propriety of the act being done."⁵⁰ Now, in determining official responsibility, it is obvious that an important distinction exists between these two classes. Accountability for the exercise of discretion is destructive of the discretionary power. Impeachment and indictment may follow misconduct or corruption. But, broadly speaking, the abuse of judicial power furnishes no private right of action, a principle which is supported by the strongest considerations of public policy.⁵¹ No reason exists, however, for exemption in the case of ministerial functions, since the officer's path is marked and defined.

Emphasis must be placed upon the nature of the duty rather than upon the title of the office, since the same individual may perform both judicial and ministerial functions. "Duties which are purely ministerial in their nature are

fense becomes important in actions for defamation, and it will be there considered. See *infra*, p. 326.

⁴⁹ *Wilson v. City of New York*, 1 Denio (N. Y.) 595, 599, 43 Am. Dec. 719, per Beardsley, J.

⁵⁰ *Flournoy v. City of Jeffersonville*, 17 Ind. 169, 174, 79 Am. Dec. 468, per Perkins, J. "The duty is ministerial when the law exacting its discharge prescribes and defines the time, mode, and occasion of its performance with such certainty that nothing remains for judgment or discretion. Official action, the result of performing a certain and specific duty arising from fixed and designated facts, is a ministerial act." *Grider v. Tally*, 77 Ala. 422, 425, 54 Am. Rep. 63, per Clapton, J.

⁵¹ See *Mills v. City of Brooklyn*, 32 N. Y. 489. Thus members of a board of aldermen are not responsible to the mayor for passing an ordinance depriving him of his fees and emoluments. *Jones v. Loving*, 55 Miss. 109, 30 Am. Rep. 508.

sometimes cast upon officers whose chief functions are judicial,"⁵² and vice versa. Thus it has been held that the issuance of a liquor license by a probate judge is ministerial, where the statute requires him to act upon the applicant's compliance with certain requirements.⁵³ So, too, is the issuance of an execution⁵⁴ and the filing of papers on appeal by a justice of the peace.⁵⁵ Another illustration appears in the habeas corpus acts, which generally require the writ to be issued whenever a *prima facie* case of unlawful confinement is made out.⁵⁶

JUDICIAL AND DISCRETIONARY ACTS

41. (I) Judicial officers.

- (a) For acts done in the exercise of jurisdiction, the judicial officer is not accountable.
- (b) For acts done wholly without jurisdiction, the judicial officer is accountable.
- (c) For acts done in excess of jurisdiction, the justice of a superior court is not liable, even though his motives were malicious and corrupt; but by the weight of authority, where jurisdiction is exceeded, the justice of an inferior court will be responsible, though some decisions have made malice and corrupt motive the test.

(II) Quasi judicial officers.

Similar principles govern the liability of quasi judicial officers.

⁵² *Mills v. City of Brooklyn*, 32 N. Y. 489, 497, per Denio, C. J. "When the law assigns to a judicial officer the performance of ministerial acts, he is as responsible for the manner in which he performs them, or for neglecting or refusing to perform them, as if no judicial functions were intrusted to him." *Grider v. Tally*, 77 Ala. 422, 424, 54 Am. Rep. 65, per Clopton, J.

⁵³ *Grider v. Tally*, *supra*.

⁵⁴ See *Gaylor v. Hunt*, 23 Ohio St. 255.

⁵⁵ *Peters v. Land*, 5 Blackf. (Ind.) 12; *Brooks v. St. John*, 25 Hun (N. Y.) 540.

⁵⁶ Code Civ. Proc. N. Y. § 2020. Cf. *Yates v. Lansing*, 5 Johns. (N. Y.) 282.

(A) For Acts Done Within Jurisdiction

"It is a principle lying at the foundation of all well-ordered jurisprudence that every judge, whether of a higher or lower court, exercising the jurisdiction vested in him by law, and deciding upon the rights of others, should act upon his own free, unbiased convictions, uninfluenced by any apprehension of consequences."⁵⁷ "Nor can the exemption of the judges from civil liability be affected by the motives with which their judicial acts are performed."⁵⁸ Were it otherwise, "the losing party may always aver that the judge has acted partially or corruptly, and may offer testimony of bystanders or others to prove it; and these proofs are addressed to the court and jury before whom the judge is called upon to defend himself, and the result is made to depend, not upon his original conviction—the conclusion of his own mind, in the decision of the original case—as by the theory of jurisprudence it ought to do, but upon the conclusions of other minds, under the influence of other and different considerations."⁵⁹ The rule is therefore based upon the highest considerations of public policy⁶⁰ and is applicable alike to the superior⁶¹ and the inferior judge.⁶²

⁵⁷ *Pratt v. Gardner*, 2 Cush. (Mass.) 63, 68, 48 Am. Dec. 652, per Shaw, C. J.

⁵⁸ *BRADLEY v. FISHER*, 13 Wall. 335, 347, 20 L. Ed. 646, Chapin Cas. Torts, 65, per Field, J.

⁵⁹ *Pratt v. Gardner*, 2 Cush. (Mass.) 63, 69, 48 Am. Dec. 652, per Shaw, C. J.

⁶⁰ The following reasons have been given by Judge Cooley (Torts [3d Ed.] p. 793): (1) The necessary result of the liability would be to occupy the judge's time and mind with the defense of his own interests, when he should be giving them up wholly to his public duties. (2) To put him on his defense necessarily lowers the public estimation of his office. (3) Civil responsibility might invite him to consult public opinion and prejudices, when he should be above them. (4) Each case would be opened to endless controversy, litigation would be multiplied, and an increase in the judicial force necessitated. (5) A prosecution at the instance of the state is much more effectual than a private suit.

⁶¹ *Yates v. Lansing*, 5 Johns. (N. Y.) 282; *Webb v. Fisher*, 109

⁶² See note 62 on following page.

(B) For Acts Wholly Without Jurisdiction

Where there is a want of jurisdiction, it is the same as though there were no court.⁶³ Under such conditions "any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible."⁶⁴ Thus, should a justice holding court for the trial of civil actions order the head of a bystander to be stricken off, and be obeyed, or a probate judge proceed to try parties for public offenses, there could be no question as to the liability incurred.⁶⁵

It has been said: "It is as easy to give a general and comprehensive definition of the word 'jurisdiction' as it is difficult to determine in special cases the precise conditions on which the right to exercise it depends. This right has reference to the power of the court over the parties, over the subject-matter, over the res or property in contest, and to the authority of the court to render the judgment or decree which it assumes to make."⁶⁶ This presupposes,

Tenn. 701, 72 S. W. 110, 60 L. R. A. 791, 97 Am. St. Rep. 863; *Rudd v. Darling*, 64 Vt. 456, 25 Atl. 479; *Fray v. Blackburn*, 3 Best & S. 576; *Anderson v. Gorrie* (1895) L. R. 1 Q. B. D. 668.

⁶³ *Austin v. Vrooman*, 128 N. Y. 229, 28 N. E. 477, 14 L. R. A. 138; *White v. Morse*, 139 Mass. 162, 29 N. E. 539; *Irion v. Lewis*, 56 Ala. 190; *Taylor v. Doremus*, 16 N. J. Law, 473; *Stewart v. Cooley*, 23 Minn. 347, 23 Am. Rep. 690; *Jordan v. Hanson*, 49 N. H. 199, 6 Am. Rep. 508; *Basten v. Carew*, 3 Barn. & C. 649. In a few states, however, a contrary view has been intimated, where malice or corruption appears. *Hitch v. Lambright*, 66 Ga. 228; *Gault v. Wallace*, 53 Ga. 675; *Knell v. Briscoe*, 49 Md. 414; *Hollon v. Lilly*, 100 Ky. 553, 38 S. W. 878. But this is contrary to the established rule.

⁶⁴ See *Grumon v. Raymond*, 1 Conn. 40, 6 Am. Dec. 200.

⁶⁵ *BRADLEY v. FISHER*, 13 Wall. 335, 352, 20 L. Ed. 646, *Chaplin Cas. Torts*, 65, per Field, J.

⁶⁶ *Lange v. Benedict*, 73 N. Y. 12, 26, 29 Am. Rep. 80; *BRADLEY v. FISHER*, *supra*.

⁶⁷ *Cooper v. Reynolds*, 10 Wall. 308, 316, 19 L. Ed. 931, per Miller, J.

therefore, that the individual acted upon was in fact before the court by voluntary appearance or constructively so by the service of some process known to the law. Hence a justice of the peace will be liable to one whom he has directed to be committed without the previous issuance of a warrant,⁶⁷ or without causing him to be brought into court,⁶⁸ or whose arrest he has caused by means of a warrant which he had no power to issue, because the deposition on which it was based failed to set forth facts or circumstances tending to establish the guilt of the accused.⁶⁹ It presupposes, likewise, that the case is one in which he is authorized to act and the process such that he has authority to issue. Thus members of a court, who issued warrants and caused the arrest of a colleague for the purpose of making up a quorum, were responsible, for there was a total lack of power on their part to take any action in such a case.⁷⁰ The same is true of the act of a judge who committed for contempt one who had disobeyed the order of an entirely distinct tribunal, since only the court whose authority is defied has power to entertain proceedings to that end;⁷¹ and a justice of the peace will be liable to one imprisoned under a commitment not based upon a judgment providing therefor.⁷²

(C) For Acts in Excess of Jurisdiction

Here a distinction must be drawn between judges of courts having superior or general jurisdiction and judges

⁶⁷ *Glazar v. Hubbard*, 102 Ky. 69, 42 S. W. 1114, 39 L. R. A. 210, 80 Am. St. Rep. 340.

⁶⁸ *Bigelow v. Stearns*, 19 Johns. (N. Y.) 39, 10 Am. Dec. 189.

⁶⁹ *Blodgett v. Race*, 18 Hun (N. Y.) 132; *McKelvey v. Marsh*, 63 App. Div. 396, 71 N. Y. Supp. 541; *Spice v. Steinruck*, 14 Ohio St. 213.

⁷⁰ *Stephens v. Wilson*, 115 Ky. 27, 72 S. W. 336.

⁷¹ *Johnson v. Bouton*, 35 Neb. 898, 53 N. W. 995.

⁷² *Lanpher v. Dewell*, 56 Iowa, 153, 9 N. W. 101. Cases showing liability for acts committed without jurisdiction are collected in *Randall v. Brigham*, 7 Wall. 531, note 1.

of inferior courts. The former are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction and are alleged to have been done maliciously and corruptly. But the weight of authority appears to be in favor of the doctrine that the latter will be responsible, however honest may have been their motives.

The reason commonly assigned for exempting the superior judge under such circumstances is that, where general jurisdiction has been conferred, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for determination as any other involved in the case. "And the same principle of exemption from liability which obtains for errors committed in the ordinary prosecution of a suit, where there is jurisdiction of both subject and person, applies in cases of this kind, and for the same reasons."⁷³ This doctrine was applied where the judge of a United States Circuit Court had sentenced plaintiff both to pay a fine and be imprisoned, although the statute under which the conviction was had provided only for fine *or* imprisonment. Here there was jurisdiction of the plaintiff, who was regularly before the court, of the cause, and of the proceedings. It was not that the court never had jurisdiction to try and sentence the plaintiff, but that the last act was in excess of jurisdiction.⁷⁴ A similar conclusion was reached where the presiding judge at the trial of John A. Surratt for the murder of Abraham Lincoln, having been insulted during recess by one of the attorneys, entered an order striking the latter's name from the rolls. Though in subsequent proceedings brought to test the validity of this act it was held that before a lawyer could be disbarred he was entitled to notice, the judge was nevertheless under no civil liability.⁷⁵

Now, on the other hand, the inferior magistrate, being empowered by law to exercise his powers only in a particu-

⁷³ BRADLEY v. FISHER, 13 Wall. 335, 353, 20 L. Ed. 646, Chapin Cas. Torts, 65, per Field, J.

⁷⁴ Lange v. Benedict, 73 N. Y. 12, 29 Am. Rep. 80.

⁷⁵ BRADLEY v. FISHER, 13 Wall. 335, 20 L. Ed. 646, Chapin Cas. Torts, 65.

lar mode and under certain limitations, had best in doubtful cases decide against his own jurisdiction. Moreover, though the presumption of law is that the superior tribunal had jurisdiction, "with regard to inferior courts and magistrates, it is for them, when claiming any right or exemption under their proceedings, to show affirmatively that they acted within the limits of their jurisdiction."⁷⁶ Honesty of purpose in such a case, while it may mitigate damages, cannot, it has been said, justify a clear usurpation of power.⁷⁷ Thus justices of the peace have been held liable where, having jurisdiction only to commit, a penal sentence has been inflicted;⁷⁸ where, having authority to require bonds to appear at a higher court, sureties to keep the peace have been exacted;⁷⁹ where an arrest has been caused upon a complaint setting forth facts not constituting a crime, but at best merely a trespass;⁸⁰ or where it appeared therefrom that a prosecution was barred by the statute of limitations.⁸¹ But other courts have intimated that malice is the test where jurisdiction has been exceeded.⁸² If, however, the want of jurisdiction is caused by matters of fact, it must be shown that they were known, or ought to have been known, to the judge or magistrate.⁸³ Thus where, from the complaint laid before him, it appears that a state of facts exists which would confer jurisdiction, and in ignorance

⁷⁶ *Piper v. Pearson*, 2 Gray (Mass.) 120, 61 Am. Dec. 438; *Clark v. May*, 2 Gray (Mass.) 410, 61 Am. Dec. 470.

⁷⁷ *Truesdell v. Combs*, 33 Ohio St. 186; *De Courcey v. Cox*, 94 Cal. 665, 30 Pac. 95; *Patzack v. Von Gerichten*, 10 Mo. App. 424; *Piper v. Pearson*, 2 Gray (Mass.) 120, 61 Am. Dec. 438.

⁷⁸ *Patzack v. Von Gerichten*, 10 Mo. App. 424.

⁷⁹ *Knowles v. Davis*, 2 Allen (Mass.) 61.

⁸⁰ *Truesdell v. Combs*, 33 Ohio St. 186; *De Courcey v. Cox*, 94 Cal. 665, 30 Pac. 95.

⁸¹ *Vaughn v. Congdon*, 56 Vt. 111, 48 Am. Rep. 758. And see, generally, *Rutherford v. Holmes*, 66 N. Y. 368; *Von Kettler v. Johnson*, 57 Ill. 109; *Morrill v. Thurston*, 46 Vt. 732; *Smith v. Bouchier*, 2 Str. 993.

⁸² *McCall v. Cohen*, 16 S. C. 445, 42 Am. Rep. 641; *Robertson v. Parker*, 99 Wis. 652, 75 N. W. 423, 67 Am. St. Rep. 889; *Bell v. McKinney*, 63 Miss. 187.

⁸³ *Clark v. May*, 2 Gray (Mass.) 410, 61 Am. Dec. 470.

that the complaint was false the magistrate has proceeded to act, he will not be responsible.⁸⁴

Many courts have refused to recognize a distinction between the superior and inferior tribunal, and apply to both alike the doctrine of nonliability where jurisdiction is exceeded.⁸⁵ It has been urged that "in reason, if judges, properly expected to be most learned, can plead official exemption for their blunderings in the law, a fortiori those from whom less is to be expected and who receive less pay should not be compelled to respond in damages to their mistakes honestly made after due carefulness."⁸⁶ This view has been summarized by the Supreme Court of Maine. "We favor," it was said, "the doctrine towards which, we think, there is a strong tendency in more recent judicial opinion, that where a judge of an inferior court or a magistrate is invested by law with jurisdiction over the general subject-matter of an alleged offense—that is, has the power to hear and determine cases of the general class to which the proceeding in question belongs—and decides, although erroneously, that he has jurisdiction over the particular offense of which complaint is made to him, or that the facts charged in the complaint constitute an offense, and acts accordingly in entire good faith, such erroneous decision is a judicial one, for which he should not be, and is not, liable in damages to a party who has been thereby injured."⁸⁷

⁸⁴ *Lowther v. Earl of Radnor*, 8 East, 413; *Pike v. Carter*, 10 Moore, 376. He is not liable for issuing an attachment in an action upon an unmatured note, where the affidavit on which the attachment was based stated that the note was due. *Connelly v. Woods*, 31 Kan. 359, 2 Pac. 773.

⁸⁵ "After an exhaustive examination of the cases which make this distinction, we have to say that we do not think that they are founded upon grounds which can be sustained by any logical or reasonable argument." *Thompson v. Jackson*, 93 Iowa, 376, 384, 61 N. W. 1004, 27 L. R. A. 92, per Rothrock, J.

⁸⁶ *Bishop Non-Contract Law*, § 783, quoted as "a complete answer to all of the reasons given why such distinction exists," in *Calhoun v. Little*, 106 Ga. 336, 32 S. E. 86, 43 L. R. A. 630, 71 Am. St. Rep. 254. To the same effect, *Cooke v. Bangs* (C. C.) 31 Fed. 640; *Allec v. Reece* (C. C.) 39 Fed. 341; *Robertson v. Parker*, 99 Wis. 652, 75 N. W. 423, 67 Am. St. Rep. 889.

⁸⁷ *RUSH v. BUCKLEY*, 100 Me. 322, 331, 61 Atl. 774, 70 L. R. A.

There is, moreover, authority for the doctrine that no liability attaches, even though a malicious motive may have existed.⁸⁸

One point, however, is well recognized. A judge, though inferior, who possesses general jurisdiction over the offense and the offender, while, as has been seen, he may be responsible if he acts in the absence of *any* facts calling for the exercise of his determination,⁸⁹ will be exempt for a mistake concerning the just weight and importance of evidence actually presented. Such would be a case where, facts and circumstances having been laid before him, he decides that they constitute reasonable grounds for believing the accused guilty and issues a warrant⁹⁰ or an order of arrest.⁹¹ If there is a total want of evidence as to essential facts, the process will be declared void, in whatever form the question may arise, and necessarily the judge has acted without authority, and there is a defect of jurisdiction. But if the proof has a legal tendency to make out a proper case in all its parts, though it may be slight and inconclusive, the

464, 4 Ann. Cas. 318, Chapin Cas. Torts, 71, per Wiswell, C. J. Here the justice of the municipal court had tried, convicted, sentenced, and issued a warrant against plaintiff, and had committed him for the violation of a city ordinance, void because it had never been published as required by statute. To the same effect, *Clark v. Spicer*, 6 Kan. 440 (facts stated did not bear out charge of willful misconduct in office); *Brooks v. Mangan*, 86 Mich. 576, 49 N. W. 633, 24 Am. St. Rep. 137 (justice of the peace holds an unconstitutional ordinance valid and enforces it by imprisonment); *Booth v. Kurrus*, 55 N. J. Law, 370, 26 Atl. 1013 (warrant issued based on facts showing a private and not a public nuisance); *Grove v. Van Duyn*, 44 N. J. Law, 654, 43 Am. Rep. 412 (under a statute making it an indictable offense to carry off corn, etc., a complaint embodying a charge of carrying off cornstalks gives colorable jurisdiction); *Austin v. Vrooman*, 128 N. Y. 229, 28 N. E. 477, 14 L. R. A. 138 (question was whether the justice might proceed with the trial of a statutory offense, thus requiring a construction of the statute).

⁸⁸ *Cooke v. Bangs* (C. C.) 31 Fed. 640; *State ex rel. Egan v. Wolver*, 127 Ind. 306, 26 N. E. 762.

⁸⁹ *Blodgett v. Race*, 18 Hun (N. Y.) 132; *McKelvey v. Marsh*, 63 App. Div. 396, 71 N. Y. Supp. 541; *Spice v. Steinruck*, 14 Ohio St. 213.

⁹⁰ *Swart v. Rickard*, 148 N. Y. 264, 42 N. E. 665; *Johnson v. Maxon*, 23 Mich. 129, 136.

⁹¹ *Dusy v. Helm*, 59 Cal. 188; *Gillett v. Thiebold*, 9 Kan. 427.

process will be valid until set aside, and the court has only erred in judgment upon a matter properly before it.⁹²

(II) Quasi Judicial Officers

The executive officer may be called upon to perform a duty which, although not in a technical sense a judicial one, since it does not concern the administration of justice between citizens, is yet of a judicial nature, since it requires the same qualities of deliberation and judgment.⁹³ Such a duty may therefore be termed "quasi judicial."

Thus, where a statute requires the letting of certain contracts to the "lowest responsible bidder," the determination of responsibility can subject the officer to no liability.⁹⁴ A like result was reached where the Postmaster General had passed upon the validity of assignments or transfers of claims against his department,⁹⁵ and a tax assessor had fixed the value of certain property at what was alleged to be an excessive rate and refused to make a proper exemption.⁹⁶ Additional illustrations are given in the note.⁹⁷

Now, assuming that the officer had not transcended the limits of his authority, will he be liable upon proof that he acted from malicious or corrupt motives? It would seem better to extend to him complete immunity, and one state

⁹² *Miller v. Brinkerhoff*, 4 Denio (N. Y.) 118, 47 Am. Rep. 242.

⁹³ Cf. *Mills v. City of Brooklyn*, 32 N. Y. 489, 495.

⁹⁴ *East River Gaslight Co. v. Donnelly*, 93 N. Y. 557.

⁹⁵ *Spalding v. Vilas*, 166 U. S. 483, 16 Sup. Ct. 631, 40 L. Ed. 780.

⁹⁶ *Weaver v. Devendorf*, 3 Denio (N. Y.) 117. To the same effect, *Steele v. Dunham*, 26 Wis. 393; *Fawcett v. Dole*, 67 N. H. 168, 29 Atl. 693.

⁹⁷ School directors act judicially in expelling or suspending a pupil. *McCormick v. Burt*, 95 Ill. 263, 35 Am. Rep. 163; *Donahoe v. Richards*, 38 Me. 379, 61 Am. Dec. 256. So do township officers in building a causeway across a stream, rather than a bridge, though the flow of water to plaintiff's mill was thereby obstructed, *Yealy v. Fink*, 43 Pa. 212, 82 Am. Dec. 556; a member of a city council in passing upon the sufficiency of the sureties upon a liquor bond, *Amperse v. Winslow*, 75 Mich. 234, 42 N. W. 823; a state auditor in determining whether municipal bonds should be registered, *Garden City G. & N. R. Co. v. Nation*, 83 Kan. 237, 109 Pac. 772; and a surveyor general in revoking the commission of a deputy surveyor, *Reed v. Conway*, 20 Mo. 22.

at least has so held.⁹⁸ But the weight of authority appears to be to the contrary.⁹⁹ At all events, if the act, though judicial in its nature, is not done in the exercise of a conferred jurisdiction, there can be no doubt of the officer's responsibility.¹⁰⁰

MINISTERIAL ACTS

42. "Where the duty imposed on an officer is purely ministerial, he will be held liable for an injury to another which results from his failure to perform it, or from his performance of it in a negligent or unskillful manner."¹⁰¹

An illustration is found in the taking of the acknowledgment of a deed or mortgage by an officer possessing notarial powers. If the certificate is false, he will be responsible to one injured thereby.¹⁰² Another arises out of the refusal of election officers to register or receive the vote of a qualified elector,¹⁰³ though on this point the courts are not in accord.¹⁰⁴ A recording officer is liable for an erroneous certificate of title to one who has employed him to examine

⁹⁸ *Weaver v. Devendorf*, 3 Denio (N. Y.) 117; *Mills v. City of Brooklyn*, 32 N. Y. 489; *East River Gaslight Co. v. Donnelly*, 93 N. Y. 557. To the same effect *Spalding v. Vilas*, 161 U. S. 483, 498, 16 Sup. Ct. 631, 40 L. Ed. 780.

⁹⁹ *McCormick v. Burt*, 95 Ill. 263, 35 Am. Rep. 163; *Parkinson v. Parker*, 48 Iowa, 667; *Friend v. Hamill*, 34 Md. 298; *Yealy v. Fink*, 43 Pa. 212, 82 Am. Dec. 556.

¹⁰⁰ *Goetcheus v. Matthewson*, 61 N. Y. 420.

¹⁰¹ *People, for Use of Munson, v. Bartels*, 138 Ill. 322, 329, 27 N. E. 1091, per Magruder, J.

¹⁰² *People, for Use of Munson, v. Bartels*, supra; *Hatton v. Holmes*, 97 Cal. 208, 31 Pac. 1131; *People ex rel. Curtiss v. Colby*, 39 Mich. 456.

¹⁰³ *Lincoln v. Hapgood*, 11 Mass. 350; *Jeffries v. Ankeny*, 11 Ohio St. 372; *Ashby v. White*, 2 Ld. Raym. 938, 92 Eng. Rep. 126, 1 Salk. 19, 91 Eng. Rep. 19.

¹⁰⁴ For the purpose of determining the qualification of voters, election officers are given judicial powers, and are responsible only when their act is malicious. *Blake v. Brothers*, 79 Conn. 676, 68 Atl. 501, 11 L. R. A. (N. S.) 501; *Bevard v. Hoffman*, 18 Md. 479, 81 Am. Dec. 618; *Pike v. Megoun*, 44 Mo. 491.

the records,¹⁰⁵ as where he omits to note a recorded mortgage,¹⁰⁶ and a clerk of court for negligently filing papers,¹⁰⁷ or for failing to store them in a fireproof vault provided for the purpose, by reason of which they were burned.¹⁰⁸ As has been seen, the valuation of property for purposes of taxation is judicial, but the collection of the tax when levied is ministerial.¹⁰⁹ Failure to construct a highway, bridge, or sewer, or to make it of sufficient size, will create no liability; for the duties of determining where it shall be located and its dimensions are in their nature judicial. But where a highway, bridge, or sewer has been determined upon, the duties of constructing it properly and of keeping it in good condition and repair are ministerial. Negligence resulting in damage will give a cause of action.¹¹⁰

The mere fact that the officer is called upon to exercise some judgment in selecting materials to be used and the manner of their use does not change the character of his acts from ministerial to judicial, or quasi judicial; for, were it otherwise, the distinction would be practically abolished. Thus, where a deputy sheep inspector was required to dip sheep "in some recognized and reliable dip known to be efficient in the cure of scab," the selection and use of a

¹⁰⁵ *Houseman v. Girard Mut. Bldg. & Loan Ass'n*, 81 Pa. 256.

¹⁰⁶ *Smith v. Holmes*, 54 Mich. 104, 19 N. W. 767. And see *Morange v. Mix*, 44 N. Y. 315. But there is no liability to third persons, as there is a lack of privity. See *Savings Bank v. Ward*, 100 U. S. 195, 25 L. Ed. 621; *Dundee Mtg. & Trust Inv. Co. v. Hughes* (C. C.) 20 Fed. 39. Nor where, there being no statutory duty to search and certify, the officer has not claimed to be skilled in searching, and has in fact used such skill as he possessed. *Mallory v. Ferguson*, 50 Kan. 685, 32 Pac. 410, 22 L. R. A. 99.

¹⁰⁷ *Rosenthal v. Davenport*, 38 Minn. 543, 38 N. W. 618.

¹⁰⁸ *Toncray v. Dodge County*, 33 Neb. 802, 51 N. W. 235.

¹⁰⁹ *Raynsford v. Phelps*, 43 Mich. 342, 5 N. W. 403, 38 Am. Rep. 189; *Blanchard v. Dow*, 32 Me. 557; *Seekins v. Goodale*, 61 Me. 400, 14 Am. Rep. 568.

¹¹⁰ *Hover v. Barkhoof*, 44 N. Y. 113; *Butler v. Ashworth*, 102 Cal. 663, 36 Pac. 922; *McCarthy v. City of Syracuse*, 46 N. Y. 194. This assumes that he has funds for the purpose or authority to obtain them. *Garlinghouse v. Jacobs*, 29 N. Y. 297; *Robinson v. Chamberlain*, 34 N. Y. 389, 90 Am. Dec. 713.

dip was held to be ministerial.¹¹¹ So a superintendent of canal repairs acts ministerially in removing obstructions, though it is true that he was bound to exercise discretion as to the methods and instrumentalities to be employed.¹¹²

A sheriff or constable is held responsible for an unlawful entry, as if he break the outer door of a dwelling for the purpose of levying an execution,¹¹³ though not an inner door,¹¹⁴ or that of a store or barn disconnected from the dwelling house and forming no part of the curtilage.¹¹⁵ He is also liable for the seizure of exempt property,¹¹⁶ for failure to execute¹¹⁷ or return process,¹¹⁸ for making a false

¹¹¹ *BAIR v. STRUCK*, 29 Mont. 45, 74 Pac. 69, 63 L. R. A. 481, Chapin Cas. Torts, 76.

¹¹² *Hicks v. Dorn*, 42 N. Y. 47. To the same effect, *McCord v. High*, 24 Iowa, 336.

¹¹³ *Welsh v. Wilson*, 34 Minn. 92, 24 N. W. 327; *Ilsley v. Nichols*, 12 Pick. (Mass.) 270, 22 Am. Dec. 425; *B. v. Sheriff of Middlesex*, Y. B. 18 Edw. IV, fol. 4, pl. 4; *Semayne's Case*, 5 Coke, 91a.

¹¹⁴ *Williams v. Spencer*, 5 Johns. (N. Y.) 352; *Lee v. Gansel*, Cowp. 1. Where the building is an apartment house leased in distinct portions to tenants, who have exclusive occupation and control of their respective tenements, using in common the entry and stairway, an officer may not break open the door of one of the apartments. *Swain v. Mizner*, 8 Gray (Mass.) 182, 69 Am. Dec. 244. But it is otherwise where one or more rooms in a single house are let as lodgings. Here the outer door is the door of the house, and not the door of each lodger's room. *Williams v. Spencer*, supra; *Lee v. Gansel*, supra.

¹¹⁵ *Haggerty v. Wilber*, 16 Johns. (N. Y.) 287, 8 Am. Dec. 321; *Clark v. Wilson*, 14 R. I. 11; *Hodder v. Williams*, L. R. (1895) 2 Q. B. D. 663. Nor where the writ directs the seizure of specific property, as in replevin. *Keith v. Johnson*, 1 Dana (Ky.) 604, 25 Am. Dec. 167; *Howe v. Oyer*, 50 Hun (N. Y.) 559, 3 N. Y. Supp. 726, 20 N. Y. St. Rep. 685; Code Civ. Proc. N. Y. § 1701. Where distinct portions of the same building are used for a store and dwelling, the officer may not force the outer door of that part of the building occupied for domestic purposes; i. e., the inside door which separates the dwelling from the rest of the interior. *Stearns v. Vincent*, 50 Mich. 209, 15 N. W. 86, 45 Am. Rep. 37.

¹¹⁶ *Williams v. Miller*, 16 Conn. 144; *Copp v. Williams*, 135 Mass. 401; *Frost v. Mott*, 34 N. Y. 253; *Freeman v. Smith*, 30 Pa. 264.

¹¹⁷ *Mathis v. Carpenter*, 95 Ala. 156, 10 South. 341, 36 Am. St.

¹¹⁸ *Wilson v. Young*, 58 Ark. 593, 25 S. W. 870; *Wehle v. Connor*, 63 N. Y. 258.

return,¹¹⁹ for the escape of a prisoner,¹²⁰ for unjustifiable refusal to bail,¹²¹ and, what is perhaps most frequent, for a levy under attachment or execution upon property not belonging to the individual named in the writ.¹²² In the last case it will be noted that by the process the officer is directed to seize property of one of the parties to the litigation, without describing the specific property to be taken. Hence he must at his peril determine the question of ownership. On the other hand, the writ may contain a direct command to take possession of particular property, leaving him no question of ownership to decide. Such are the writ of replevin, orders of sequestration in chancery, and nearly all the processes of the admiralty court by which the res is brought before it for its action.¹²³ Here no liability will be incurred, though the property does not in fact belong to the party against whom the mandate was issued.¹²⁴

Hitherto it has been assumed that the writ itself was not open to attack. The question was therefore whether the officer properly complied with the directions given him, not whether he should have acted at all. But it may be that the writ was improperly issued. In such cases he is not absolutely liable, for protection will be extended him if the process was "*fair on its face*." By this is meant that it has proceeded "from a court, magistrate, or body having authority of law to issue process of that nature, and which is legal in form and on its face contains nothing to notify or fairly apprise the officer that it is issued without authori-

Rep. 187; *Crosson v. Olson*, 47 Minn. 27, 49 N. W. 406; *Steele v. Crabtree*, 40 Neb. 420, 58 N. W. 1022.

¹¹⁹ *Remick v. Wentworth*, 89 Me. 392, 36 Atl. 622; *Bacon v. Cropsey*, 7 N. Y. 195; *McMichael v. McKeon*, 10 Pa. 143.

¹²⁰ *Winborne v. Mitchell*, 111 N. C. 13, 15 S. E. 882.

¹²¹ *Berrer v. Moorhead*, 22 Neb. 687, 36 N. W. 118.

¹²² *Boulware v. Craddock*, 30 Cal. 190; *Symonds v. Hall*, 37 Me. 354, 59 Am. Dec. 53; *Farrel v. Colwell*, 30 N. J. Law, 123; *WINT-RINGHAM v. LAFOY*, 7 Cow. (N. Y.) 735, *Chapin Cas. Torts*, 181; *Welsh v. Bell*, 32 Pa. 12; *Hunt v. Lathrop*, 7 R. I. 58.

¹²³ *Buck v. Colbath*, 3 Wall. 334, 343, 18 L. Ed. 257.

¹²⁴ *Haslett v. Rodgers*, 107 Ga. 239, 33 S. E. 44; *Willard v. Kimball*, 10 Allen (Mass.) 211, 87 Am. Dec. 632; *Foster v. Pettibone*, 20 Barb. (N. Y.) 350. A sheriff is, of course, responsible if he levies

ty.”¹²⁵ No responsibility is therefore incurred where the officer acted under process apparently regular, but in fact based upon a judgment prematurely rendered,¹²⁶ or rendered against one who had not been summoned,¹²⁷ or where the justice before whom it was obtained lacked jurisdiction, because defendant resided in another county.¹²⁸ Nor is he liable for a levy and sale where the execution by virtue of which it was made had been issued after the judgment had been paid,¹²⁹ nor for an arrest on a *capias* based upon contempt committed during a trial before a justice, though the punishment was imposed after the trial had terminated, and hence was unauthorized, under a statute which permitted a justice to take such action only during the pendency of the cause.¹³⁰ An officer “cannot be affected,” it has been said, “by any irregularity occurring prior to the issue of his precept, nor by the existence of any fact which deprives the court or magistrate of jurisdiction in that particular case, provided the defect be not disclosed by the precept itself, nor known to the officer. Even if the defect be one which renders the precept void in its operation between the parties, or for the transfer of property, yet it will not subject the officer to liability as a trespasser.”¹³¹

upon property not covered by the writ. *Einstein v. Dunn*, 61 App. Div. 195, 70 N. Y. Supp. 520, affirmed 171 N. Y. 648, 63 N. E. 1116.

¹²⁵ Cooley on Torts (3d Ed.) p. 883. “If a mere ministerial officer executes any process upon the face of which it appears that the court which issued it had not jurisdiction of the subject-matter or of the person against whom it is directed, such process will afford him no protection for acts done under it. If the subject-matter of a suit is within the jurisdiction of a court, but there is a want of jurisdiction as to the person or place, the officer who executes process in such suit is no trespasser, unless the want of jurisdiction appears by such process.” *Savacool v. Boughton*, 5 Wend. (N. Y.) 170, 181, 21 Am. Dec. 181, per Marcy, J.

¹²⁶ *Wilbur v. Stokes*, 117 Ga. 545, 43 S. E. 856.

¹²⁷ *Savacool v. Boughton*, 5 Wend. (N. Y.) 170, 181, 21 Am. Dec. 181.

¹²⁸ *Heath v. Halfhill*, 106 Iowa, 131, 76 N. W. 522.

¹²⁹ *Lewis v. Palmer*, 6 Wend. (N. Y.) 367; *Twitchell v. Shaw*, 10 Cush. (Mass.) 46, 57 Am. Dec. 80.

¹³⁰ *Clarke v. May*, 2 Gray (Mass.) 410, 61 Am. Dec. 470.

¹³¹ *Chase v. Ingalls*, 97 Mass. 524, 529, per Wells, J. For further illustrations of action under process fair on its face, see *Baker v.*

From the statement just quoted it would appear that, though the process be fair on its face, the officer would be accountable where he is aware that *facts* exist which render it void. A later decision from the same state confirms this. Here the constable had arrested a Norwegian subject, master of a Norwegian vessel, in a suit brought by a seaman for wages. Before serving the writ he had been informed that because of a treaty the court lacked jurisdiction. This, it was held, rendered him liable for false imprisonment.¹⁸² While this view is not without support,¹⁸³ it has not met with general approval.¹⁸⁴ To withhold protection under such circumstances seems to be of doubtful propriety.¹⁸⁵

Where the process is not fair on its face, it furnishes no justification to the officer who has acted under it. Such, it has been held, would be a general warrant to search all suspected places, and search and arrest all suspected persons,

Sheehan, 29 Minn. 235, 12 N. W. 704; Melcher v. Scruggs, 72 Mo. 406; Bergin v. Hayward, 102 Mass. 414; PEOPLE v. WARREN, 5 Hill (N. Y.) 440, Chapin Cas. Torts, 80; Hill v. Haynes, 54 N. Y. 153; Holz v. Rediske, 116 Wis. 353, 92 N. W. 1105.

¹⁸² Tellefsen v. Fee, 168 Mass. 188, 46 N. E. 562, 45 L. R. A. 481, 60 Am. St. Rep. 379.

¹⁸³ Leachman v. Dougherty, 81 Ill. 324; Grace v. Mitchell, 31 Wis. 533, 11 Am. Rep. 613.

¹⁸⁴ Watson v. Watson, 9 Conn. 140, 23 Am. Dec. 324; Heath v. Halfhill, 106 Iowa, 131, 76 N. W. 522; Brainard v. Head, 15 La. Ann. 489; Wall v. Trumbull, 16 Mich. 228; Webber v. Gay, 24 Wend. (N. Y.) 485; PEOPLE v. WARREN, 5 Hill (N. Y.) 440, Chapin Cas. Torts, 80; Rice v. Miller, 70 Tex. 613, 8 S. W. 317, 8 Am. St. Rep. 630.

¹⁸⁵ "To the magistrate is confided the issuing of writs, and to the sheriff and other executive officers is confided the duty of serving them. It is easy to see what widespread mischief might result from permitting an executive officer to decide, on his own knowledge, that he ought not to serve a precept or warrant put into his hands for service, and to consider what justly must follow from such doctrine; that is, that his return of the fact would be a justification for his omission. In short, the executive officer must do his duty, which is to obey all legal writs, and must not arrogate to himself the right of disobeying the paramount commands of those to whose mandates he by law is subjected." Watson v. Watson, 9 Conn. 140, 146, 23 Am. Dec. 324, per Hosmer, C. J.

no place or person being designated;¹³⁶ an attachment issued by one who had been a justice, but whose term of office had expired at the time;¹³⁷ an execution against a judgment debtor whose surname is correctly given, but whose first name, being "unknown to the plaintiff," is stated as the fictitious "John";¹³⁸ and a writ of possession issued by a justice of the peace, which shows that it was based on a judgment in plaintiff's favor to recover "his title and possession" of land, a justice having no jurisdiction to entertain such a proceeding.¹³⁹

INFANTS

43. While infants are liable for their torts, yet, not being responsible for their contracts, they cannot be held in an action *ex delicto* where the cause of action is really *ex contractu*.

For the reason that in an action in tort the law will regard the loss or damage of the party suffering rather than the mental attitude of the actor, it has been thoroughly established that the infant is to be held accountable for his wrongs. "If an infant commit an assault, or utter slander, God forbid that he should not be answerable for it in a court of justice."¹⁴⁰ He has been held liable, therefore, for injuries to real¹⁴¹ and personal property,¹⁴² including its

¹³⁶ *Grumon v. Raymond*, 1 Conn. 40, 6 Am. Dec. 200.

¹³⁷ *Smith v. Hilton*, 147 Ala. 642, 41 South. 747.

¹³⁸ Since such a writ does not direct the collection of the judgment from the debtor, and the officer might levy upon the property of any individual of the same surname. *Goldberg v. Markowitz*, 94 App. Div. 237, 87 N. Y. Supp. 1045, affirmed 182 N. Y. 540, 75 N. E. 1129.

¹³⁹ *Sartwell v. Sowles*, 72 Vt. 270, 48 Atl. 11, 82 Am. St. Rep. 943. For further illustrations, see *State v. McDonald*, 14 N. C. 468; *Harwood v. Siphers*, 70 Me. 464; *Sandford v. Nichols*, 13 Mass. 286, 7 Am. Dec. 151; *Hussey v. Davis*, 58 N. H. 317.

¹⁴⁰ *Jennings v. Rundall*, 8 Term R. 335, 337, per Kenyon, C. J.

¹⁴¹ *Scott v. Watson*, 46 Me. 362, 74 Am. Dec. 457; *Huchting v. Engel*, 17 Wis. 230, 84 Am. Dec. 741.

¹⁴² As where he threw a firecracker, causing the death of plaintiff's horse. *Conklin v. Thompson*, 29 Barb. (N. Y.) 218.

unlawful taking¹⁴³ and detention;¹⁴⁴ for assault and battery,¹⁴⁵ libel,¹⁴⁶ seduction,¹⁴⁷ though under promise of marriage,¹⁴⁸ and for negligence.¹⁴⁹ It will constitute no defense to a tort that he has acted under the direction of his parent or guardian.¹⁵⁰ Nor will the parent or guardian be responsible for the acts of the infant merely because of the relationship. Agency must be proved.¹⁵¹

As any contract arising out of the relation of master and servant or principal and agent is not binding upon the infant, he cannot be held responsible for the acts or neglect of another by virtue of the doctrine *respondeat superior* in

¹⁴³ Shaw v. Coffin, 58 Me. 254, 4 Am. Rep. 290.

¹⁴⁴ Wheeler & Wilson Mfg. Co. v. Jacobs, 2 Misc. Rep. 236, 21 N. Y. Supp. 1006.

¹⁴⁵ Peterson v. Haffner, 59 Ind. 130, 26 Am. Rep. 81; Sikes v. Johnson, 16 Mass. 389.

¹⁴⁶ Fears v. Riley, 148 Mo. 49, 49 S. W. 836.

¹⁴⁷ Fry v. Leslie, 87 Va. 269, 12 S. E. 671.

¹⁴⁸ Lee v. Hefley, 21 Ind. 98; Becker v. Mason, 93 Mich. 336, 53 N. W. 361. But he is not liable in an action for breach of promise to marry, though seduction has been induced by means of the promise. Leichtweiss v. Treskow, 21 Hun (N. Y.) 487; Hamilton v. Lomax, 26 Barb. (N. Y.) 615.

¹⁴⁹ As where through careless handling he discharged a gun, Conway v. Reed, 66 Mo. 346, 27 Am. Rep. 354; or while playing threw a ball which frightened plaintiff's horse, Neal v. Gillett, 23 Conn. 437 (judgment reversed on another ground).

¹⁵⁰ "Nor can the defendant derive any support from the scriptural injunction to children of obedience to their parents, invoked in defense. No such construction can be given to the command, 'Children obey your parents in the Lord, for this is right.' * * * The defense is as unsound in its theology as it is baseless in its law." Scott v. Watson, 46 Me. 362, 363, 74 Am. Dec. 457, per Appleton, J. To the same effect, School Dist. No. 1. v. Bragdon, 23 N. H. 507; Humphrey v. Douglass, 10 Vt. 71, 33 Am. Dec. 177.

¹⁵¹ Tift v. Tift, 4 Denio (N. Y.) 175; Smith v. Davenport, 45 Kan. 423, 25 Pac. 851, 11 L. R. A. 429, 23 Am. St. Rep. 737; Wilson v. Garrard, 59 Ill. 51. "There is no such relation existing between father and son, though the son be living with his father as a member of his family, as will make the acts of the son more binding upon the father than the acts of any other person." Paul v. Hummel, 43 Mo. 119, 122, 97 Am. Dec. 381, per Wagner, J. Where agency is established the father is liable. Schaefer v. Osterbrink, 67 Wis. 495, 30 N. W. 922, 58 Am. Rep. 875.

a case where he has not actually participated in the wrong.¹⁵² Hence he is not liable for the malicious prosecution of a suit during his infancy in his name by his next friend, which was brought without his knowledge or authority,¹⁵³ nor for the negligence of an agent intrusted with the care of his building, which caused an overflow of water, injuring the property of a tenant.¹⁵⁴ This does not, however, militate against the rule that as owner or occupant of lands the infant is liable to the same extent as an adult for creating or maintaining a nuisance, or for negligent use or management by his servants. He cannot evade the responsibility nor delegate the duties which ownership entails.¹⁵⁵

Now the rule under which infants are held for their torts is not unlimited, but is to be applied with due regard to the settled doctrine that they are not liable on their contracts. "The dominant consideration," it has been said, "is not that of liability for their torts, but of protection from their contracts."¹⁵⁶ Hence, where the obligation sought to be enforced is essentially contractual, they cannot be charged merely because the action may have been brought in tort form, since otherwise the rule under which they receive protection from their contracts might be evaded. If, therefore, the wrong complained of consists merely in the non-performance or improper performance of an agreement, plaintiff will not be permitted to recover by a trick of pleading, while, on the other hand, infants are liable for a distinct and independent wrong, though the relation between the parties might have been the result of contract. The test, it has been said, is whether liability can be made out

¹⁵² *Burns v. Smith*, 29 Ind. App. 181, 64 N. E. 94, 94 Am. St. Rep. 268.

¹⁵³ *Burnham v. Seaverns*, 101 Mass. 360, 100 Am. Dec. 123.

¹⁵⁴ *Robbins v. Mount*, 33 How. Prac. (N. Y.) 24.

¹⁵⁵ *McCabe v. O'Connor*, 4 App. Div. 354, 38 N. Y. Supp. 572, affirmed 162 N. Y. 600, 57 N. E. 1116. Injuries caused by fall of defective wall.

¹⁵⁶ *SLAYTON v. BARRY*, 175 Mass. 513, 515, 56 N. E. 574, 49 L. R. A. 560, 78 Am. St. Rep. 510, Chapin Cas. Torts, 81.

without taking notice of the contract.¹⁵⁷ Thus an infant was held not liable where, having contracted to thresh wheat, he used an engine without a spark arrester and placed it so negligently that fire was communicated to a barn belonging to the owner of the wheat, though it would have been otherwise had his act been willful, in the sense of intentional, and not merely negligent.¹⁵⁸ The determination of this question is difficult and the cases are far from consistent. Usually fraud or the contract of bailment is involved. Thus, suppose the infant has obtained goods under an agreement of purchase by false representations as to his age or as to other facts, or, being the vendor, has brought about the sale by similar means. May he be held responsible in tort for the deceit? The weight of authority appears to be in the negative. The contract is regarded as the basis of the action. The fraud is predicated on the contract.¹⁵⁹ Though it would seem better to hold, as some courts have done, that, the deceit being really the basis of the contract, a tort action will lie.¹⁶⁰ But his false representations and subsequent avoidance of the contract may justify the other party in recovering the property conveyed, on the theory that he has never parted with title.¹⁶¹ Whether the infant may under such circumstances be sued for its conversion is in dispute.¹⁶²

¹⁵⁷ *Lowery v. Cate*, 108 Tenn. 54, 61, 64 S. W. 1068, 57 L. R. A. 673, 91 Am. St. Rep. 744; *Fitts v. Hall*, 9 N. H. 441.

¹⁵⁸ *Lowery v. Cate*, supra.

¹⁵⁹ *SLAYTON v. BARRY*, 175 Mass. 513, 56 N. E. 574, 49 L. R. A. 560, 78 Am. St. Rep. 510, Chapin Cas. Torts, 81; *Prescott v. Norris*, 32 N. H. 101; *Doran v. Smith*, 49 Vt. 353; *Nash v. Jewett*, 61 Vt. 501, 18 Atl. 47, 4 L. R. A. 561, 15 Am. St. Rep. 931; *Johnson v. Pie*, 1 Keb. 905, 83 Eng. Repr. 353, 1 Sid. 258, 82 Eng. Repr. 1091.

¹⁶⁰ *Rice v. Boyer*, 108 Ind. 472, 9 N. E. 420, 58 Am. Rep. 53; *Eckstein v. Frank*, 1 Daly (N. Y.) 334; *Wallace v. Morss*, 5 Hill (N. Y.) 391. There can be no recovery in an action in contract. *Studwell v. Shapter*, 54 N. Y. 249. The cases are discussed in *Ferguson v. Bobo*, 54 Miss. 121.

¹⁶¹ *Nolan v. Jones*, 53 Iowa, 387, 5 N. W. 572; *Neff v. Landis*, 110 Pa. 204, 1 Atl. 177; *Wheeler & Wilson Mfg. Co. v. Jacobs*, 2 Misc. Rep. 236, 21 N. Y. Supp. 1006; *Eckstein v. Frank*, 1 Daly (N. Y.) 334.

¹⁶² That he cannot, *SLAYTON v. BARRY*, 175 Mass. 513, 56 N. E.

If the infant, having received personal property as a bail-ee, does any willful and positive act which amounts to an election on his part to disaffirm the contract of bailment, his infancy will not protect him. Thus, if he hires a horse to go to a certain place, but goes beyond, or in a different direction, he will be held for conversion, and liable for any injuries sustained;¹⁶³ or if, knowing that the horse is unfit to jump and after agreeing not to allow it to do so, he permits a friend to use it for such a purpose;¹⁶⁴ or if he willfully beats or drives at such an immoderate speed as seriously to endanger the animal's life.¹⁶⁵ But a mere failure to exercise proper care, as where the injury resulted from lack of moderation in driving, due to want of experience or discretion, there being no willful and intentional injury, is to be deemed no more than a violation of his agreement, for which, as an infant, he is not responsible.¹⁶⁶

So, if he is intrusted with goods to be sold on commission, with instructions to sell only for cash, his sale on credit will not permit the owner to recover against him in an action *ex delicto*.¹⁶⁷

574, 49 L. R. A. 560, 78 Am. St. Rep. 510, Chapin Cas. Torts, 81; *Stone v. Rabinowitz*, 45 Misc. Rep. 405, 90 N. Y. Supp. 301 (semble). That he can, *Mathews v. Cowan*, 59 Ill. 341; *Eckstein v. Frank*, 1 Daly (N. Y.) 334.

¹⁶³ *Homer v. Thwing*, 3 Pick. (Mass.) 492; *Freeman v. Boland*, 14 R. I. 39, 51 Am. Rep. 340; *Churchill v. White*, 58 Neb. 22, 78 N. W. 369, 76 Am. St. Rep. 64. So where he drove by a very circuitous route, which nearly doubled the distance. *Towne v. Wiley*, 23 Vt. 355, 56 Am. Dec. 85. But slight and immaterial departures from the general course outlined in the contract will not constitute conversion. *Young v. Muhling*, 48 App. Div. 617, 63 N. Y. Supp. 181.

¹⁶⁴ *Burnard v. Haggis*, 14 C. B. (N. S.) 45, 9 Jur. N. S. 1325, 32 L. J. C. P. 189, 8 L. T. Rep. N. S. 320, 11 Wkly. Rep. 644, 108 E. C. L. 45.

¹⁶⁵ See *Eaton v. Hill*, 50 N. H. 235, 9 Am. Rep. 189.

¹⁶⁶ *Young v. Muhling*, 48 App. Div. 617, 63 N. Y. Supp. 181; *Moore v. Eastman*, 1 Hun (N. Y.) 578; *Eaton v. Hill*, 50 N. H. 235, 9 Am. Rep. 189. The principle is discussed in *Campbell v. Stakes*, 2 Wend. (N. Y.) 137, 19 Am. Dec. 561.

¹⁶⁷ *Caswell v. Parker*, 96 Me. 39, 51 Atl. 238. Cf. *Vasse v. Smith*, 6 Cranch, 226, 3 L. Ed. 207.

INSANE PERSONS

44. Insane persons are liable for their torts, though the soundness of this rule has been questioned where culpable mental attitude is an essential ingredient.

"It is well settled that, though a lunatic is not punishable criminally, he is liable to a civil action for any tort he may commit. However justly this doctrine may have been originally subject to criticism on the grounds of reason and principle, it is too firmly supported by the weight of authority to be disturbed."¹⁶⁸ This has been placed upon several grounds. It has been said that, where one of two innocent persons must suffer, he who caused the loss should pay; also that public policy requires the enforcement of his liability, that his relatives may be under inducement to restrain him, or lest wrongdoers should simulate insanity. "The lunatic must bear the loss occasioned by his torts, as he bears his other misfortunes, and the burden of such loss may not be put upon others."¹⁶⁹ Thus insanity has been held no defense in actions for assault and battery,¹⁷⁰ or for burning a barn,¹⁷¹ killing an ox,¹⁷² failing as innkeeper to keep safely the goods of a guest,¹⁷³ shooting the plaintiff's wife,¹⁷⁴ and for causing a wrongful arrest while acting as a justice of the peace.¹⁷⁵ Like an infant, he is also liable for injuries caused by the defective condition of his real estate, since there is no reason for holding that a lunatic, having the

¹⁶⁸ *McIntyre v. Sholty*, 121 Ill. 660, 664, 13 N. E. 239, 2 Am. St. Rep. 140, per Magruder, J.

¹⁶⁹ *Williams v. Hays*, 143 N. Y. 442, 447, 38 N. E. 449, 26 L. R. A. 153, 42 Am. St. Rep. 743, per Earl, J.

¹⁷⁰ *Ward v. Conatser*, 4 Baxt. (Tenn.) 64.

¹⁷¹ *Cross v. Kent*, 32 Md. 581.

¹⁷² *Morse v. Crawford*, 17 Vt. 499, 44 Am. Dec. 349.

¹⁷³ *Cross v. Andrews*, Cro. Eliz. 622, 78 Eng. Rep. 863.

¹⁷⁴ *McIntyre v. Sholty*, 121 Ill. 660, 13 N. E. 239, 2 Am. St. Rep. 140. In accord, *Jewell v. Colby*, 66 N. H. 399, 24 Atl. 902.

¹⁷⁵ *Krom v. Schoonmaker*, 3 Barb. (N. Y.) 647.

benefits, should be exempt from the responsibilities, of ownership.¹⁷⁶

In torts where malice is an element, such as malicious prosecution and defamation, it has been thought that there might be no recovery, since "the rules which preclude criminal responsibility are strictly applicable here, because there is an absence of the same necessary element."¹⁷⁷ "It would be a monstrous absurdity, for instance," says a learned author, "if one were held entitled to maintain an action for defamation of character for the thoughtless babblings of an insane person to his keepers, or for any wild communication he might send through the mail or post upon the wall."¹⁷⁸ In two states, at least, insanity has been recognized as a defense in an action for defamation.¹⁷⁹ Now, although in the case supposed a verdict against the inhabitant of a mad house would undoubtedly be absurd, the illustration is extreme, and a principle under which one who has been defamed could obtain no compensation if the defamer were a lunatic, though the communication were made to a third party who was ignorant of the insanity, appears open to serious objection. The craftiness of the paranoiac may enable him to conceal his infirmity until an advanced stage has been reached. Up to that time he may be the author of convincing, though utterly baseless, charges.¹⁸⁰ It seems better not to place such wrongs in a separate class, but to apply to them the general tort rule that the insanity of the actor bears only on the quantum of the recovery.¹⁸¹ By eliminating malice we eliminate also all

¹⁷⁶ *Morain v. Devlin*, 132 Mass. 87, 42 Am. Rep. 423.

¹⁷⁷ *Cooley on Torts* (3d Ed.) p. 177.

¹⁷⁸ *Id.* p. 176.

¹⁷⁹ *Irvine v. Gibson*, 117 Ky. 306, 77 S. W. 1106, 25 Ky. Law Rep. 1418, 111 Am. St. Rep. 251, 4 Ann. Cas. 569; *Bryant v. Jackson*, 6 Humph. (Tenn.) 199.

¹⁸⁰ Take, for instance, certain forms of sexual delusions; e. g., that plaintiff had attempted to commit rape upon the defendant, or that illicit relations existed between plaintiff and another.

¹⁸¹ *Yeates v. Reed*, 4 Blackf. (Ind.) 463, 32 Am. Dec. 43; *McDougald v. Coward*, 95 N. C. 368. In *Dickinson v. Barber*, 9 Mass. 225, 228, 6 Am. Dec. 58, although the court declined to express an opin-

punitive damages and confine the sufferer to compensation.¹⁸²

It has been thought that the person of unsound mind is responsible to the same extent as though he were sane; that is, he is responsible for what in a sane person would be called negligent conduct.¹⁸³ But in determining whether negligence has been shown it will be necessary to consider the circumstances as a whole, since it might under certain conditions be grossly unfair to isolate that portion of the defendant's conduct which dated from the time insanity occurred. Thus, where the captain of a vessel caught in a storm had been on duty almost continuously for three days and nights, finally becoming temporarily insane, due to exhaustion and the taking of quinine in large doses, it was held that the loss of the vessel, owing to his incapacity to care for and navigate it while in that condition, could not properly be attributed to his fault.¹⁸⁴

Drunkenness

If insanity is to be regarded as insufficient to constitute a defense, there is certainly no reason why drunkenness

ion "how far or to what degree insanity was to be received as an excuse," it was observed that "where the derangement was great and notorious, so that the speaking the words could produce no effect on the hearers, it was manifest no damage would be incurred; but where the degree of insanity was slight, or not uniform, the slander might have its effect, and it would be for the jury to judge upon the evidence before them and measure the damages accordingly."

¹⁸² This is the general rule in cases of insanity. *Krom v. Schoonmaker*, 3 Barb. (N. Y.) 650; *McIntyre v. Sholty*, 121 Ill. 660, 13 N. E. 239, 2 Am. St. Rep. 140; *Jewell v. Colby*, 66 N. H. 399, 24 Atl. 902.

¹⁸³ *Williams v. Hays*, 157 N. Y. 541, 52 N. E. 589, 43 L. R. A. 253, 68 Am. St. Rep. 797. But see *infra*, p. 548, as to contributory negligence.

¹⁸⁴ "What careful and prudent man could do more," it was asked, "than to care for his vessel until overcome by physical and mental exhaustion?" *Williams v. Hays*, 157 N. Y. 541, 548, 52 N. E. 589, 43 L. R. A. 253, 68 Am. St. Rep. 797; *Id.*, 143 N. Y. 442, 38 N. E. 449, 28 L. R. A. 153, 42 Am. St. Rep. 743. It is evident that this case does not militate against the general rule governing liability of the insane, since it appears that no negligence was established.

should be favored, since the disability has here been produced by a voluntary act.¹⁸⁵ But evidence that a defamer was at the time in such a condition that no one who heard him would give credence to his charges would be competent as bearing on the amount of damages to be awarded.¹⁸⁶

HUSBAND AND WIFE ¹⁸⁷

45. At common law both husband and wife were liable for the latter's torts, though if they were committed in the presence of the husband it was presumed that she had acted under his coercion and that the wrong was his alone. But statutes have generally made them individually responsible, and not one for the other, where joint liability would not otherwise exist.

In three cases, the common law held both husband and wife jointly liable for the latter's torts: (1) Where the husband was absent and had no knowledge of the intended act;¹⁸⁸ (2) where the husband was absent, but the tort was done under his direction and instigation;¹⁸⁹ (3) where the husband was present, but the wife acted of her own voli-

¹⁸⁵ *St. Ores v. McGlashen*, 74 Cal. 148, 15 Pac. 452; *Cassady v. Magher*, 85 Ind. 228; *Barbee v. Reese*, 60 Miss. 906. This includes defamation. *McKee v. Ingalls*, 5 Ill. 30; *Reed v. Harper*, 25 Iowa, 87, 95 Am. Dec. 774.

¹⁸⁶ See *Gates v. Meredith*, 7 Ind. 440 (where, however, the view appears to have been taken that intoxication was a complete defense); *Wakelin v. Morris*, 2 Fost. & Fin. 26. But while malice may thereby be rebutted, yet if the defendant has repeated the words when sober, his previous intoxication is no reason for abating the damages. *Howell v. Howell*, 32 N. C. 82.

¹⁸⁷ Logically the liability of the husband for the torts of the wife should have been discussed later, under the head of responsibility for another's wrongs. It is now considered, so that repetition may be avoided.

¹⁸⁸ *Henley v. Wilson*, 137 Cal. 273, 70 Pac. 21, 58 L. R. A. 941, 92 Am. St. Rep. 160; *Presnell v. Moore*, 120 N. C. 390, 27 S. E. 27; *Head v. Briscoe*, 5 Car. & P. 484.

¹⁸⁹ *Handy v. Foley*, 121 Mass. 259, 23 Am. Rep. 270.

tion.¹⁹⁰ In a fourth case, namely, where the tort was committed in the company of the husband and by his direction,¹⁹¹ he alone was liable.¹⁹² His physical presence at the time gave rise to the presumption that she had acted *sub potestate viri*,¹⁹³ though this was not conclusive, and if it were proven that she had acted of her own motion the liability was then joint.¹⁹⁴ It will be noted, therefore, that in but one instance did the law permit the wife to escape liability, namely, where both the presence and direction of the husband concurred. A wrong by his direction, but not in his presence, did not exempt her from responsibility; nor did his presence, if unaccompanied by his direction.¹⁹⁵ Where these facts appeared, the husband was the sole offending party. In other cases he must have been joined in the suit.¹⁹⁶ The doctrine arose out of the common-law theory of the wife's loss of identity, by virtue of which her property vested in or became subject to the husband's control. Hence "it would be idle to sue the wife alone; the action would be fruitless."¹⁹⁷ It is obvious, however, that

¹⁹⁰ Cassin v. Delany, 38 N. Y. 178.

¹⁹¹ Brazil v. Moran, 8 Minn. 236 (Gil. 205) 83 Am. Dec. 772.

¹⁹² Kosminsky v. Goldberg, 44 Ark. 401, 402, per Smith, J.; McElroy v. Capron, 24 R. I. 561, 54 Atl. 44.

¹⁹³ Johnson v. McKeown, 1 McCord (S. C.) 578, 10 Am. Dec. 698; Strouse v. Leipf, 101 Ala. 433, 14 South. 667, 23 L. R. A. 622, 46 Am. St. Rep. 122. And see Carleton v. Haywood, 49 N. H. 314.

¹⁹⁴ Marshall v. Oakes, 51 Me. 308; Smith v. Schoene, 67 Mo. App. 604; Wagener v. Bill, 19 Barb. (N. Y.) 321; Wheeler & Wilson Mfg. Co. v. Hell, 115 Pa. 487, 8 Atl. 616, 2 Am. St. Rep. 575; McElroy v. Capron, 24 R. I. 561, 54 Atl. 44; Edwards v. Wessinger, 65 S. C. 161, 43 S. E. 518, 95 Am. St. Rep. 789.

¹⁹⁵ Cassin v. Delany, 38 N. Y. 178; Kosminsky v. Goldberg, 44 Ark. 401; Hildreth v. Camp, 41 N. J. Law, 306.

¹⁹⁶ Flesh v. Lindsay, 115 Mo. 1, 21 S. W. 907, 37 Am. St. Rep. 374; Dailey v. Houston, 58 Mo. 361.

¹⁹⁷ Capell v. Powell, 17 C. B. N. S. 743, 748, per Erle, C. J. The husband's power over the wife's person was aptly set forth by Petruchio ("Taming of the Shrew"):

"I will be master of what is mine own;
She is my goods, my chattels; she is my house,
My household stuff, my field, my barn,
My horse, my ox, my ass, my anything."

where the husband has participated in the wrong he would be liable individually, without regard to his responsibility as husband.¹⁹⁸ So he will be held where she acted as his agent, as for false representations made by her while representing him in the sale of a business.¹⁹⁹

Where the husband is joined "for conformity," as it is termed, if he dies, the action goes on against the wife; if the wife dies, a personal action abates; and if they are divorced, joinder of the husband ceases to be necessary.²⁰⁰

Since the married woman might not at common law bind herself by contract, she could no more be held *ex delicto*, when this would in substance have amounted to enforcing her liability *ex contractu*, than could an infant.²⁰¹

Statutory Changes

The changes which have been worked by legislation in the several states cannot well be considered in detail. The tendency is to place the wife upon an individual footing and to do away with the responsibility of the husband as such. His liability as in the case of other tort-feasors is therefore generally made to depend upon his own acts, leaving him responsible for a wrong committed by the wife only upon proof of direct instigation or participation.²⁰² Whether a

¹⁹⁸ See *Crow v. Manning*, 45 La. Ann. 1221, 14 South. 122; *Miller v. Schweitzer*, 22 Mich. 391; *Hinds v. Jones*, 48 Me. 348; *Kowing v. Manly*, 49 N. Y. 192, 10 Am. Rep. 346; *Keyworth v. Hill*, 3 Barn. & Ald. 685, 106 Eng. Repr. 811.

¹⁹⁹ *Taylor v. Green*, 8 Car. & P. 316.

²⁰⁰ *Capell v. Powell*, 17 C. B. N. S. 743. Joinder is necessary where they are living separately, but are not divorced. *Head v. Briscoe*, 5 Car. & P. 484.

²⁰¹ *D. Wolff & Co. v. Lozier*, 68 N. J. Law, 103, 52 Atl. 303; *Keen v. Coleman*, 39 Pa. 299, 80 Am. Dec. 524; *Woodward v. Barnes*, 46 Vt. 332, 14 Am. Rep. 626; *Fairhurst v. Liverpool Ass'n*, 9 Exch. 422; *Cooper v. Witham*, 1 Lev. 247, 1 Sld. 375.

²⁰² In New York, for example, a married woman "is liable for her wrongful or tortious acts; her husband is not liable for such acts unless they were done by his actual coercion or instigation; and such coercion or instigation shall not be presumed but must be proved." Consol. Laws 1909, c. 14, § 57; *Strubing v. Mahar*, 46 App. Div. 409, 61 N. Y. Supp. 799. To the same effect, *Blakeslee v. Tyler*, 55 Conn. 397, 11 Atl. 855; *McCabe v. Berge*, 89 Ind. 225; *Austin v. Cox*, 118 Mass. 58; *McElroy v. Capron*, 24 R. I. 561, 54 Atl. 44.

statute, general in its terms, giving to the wife control over her person and property, is to be construed as abrogating the rule at common law, is disputed. Strict construction has been favored in many cases which hold that the legislative intent to make the change must be clearly expressed, failing which, the husband's responsibility remains.²⁰³ But by some of the courts the contrary conclusion has been reached; i. e., that statutes of this character are destructive of the husband's common-law liability, since "his legal supremacy is gone, and the scepter has departed from him."²⁰⁴ But though such legislation, if strictly construed, may result in leaving the common law unchanged with respect to personal torts, such as defamation, yet, the wife having thereupon been vested with the control and enjoyment of her separate property, there would appear no good reason why the husband should continue liable for wrongs arising out of its care and management.²⁰⁵

²⁰³ *Henley v. Wilson*, 137 Cal. 273, 70 Pac. 21, 58 L. R. A. 941, 92 Am. St. Rep. 160; *Taylor v. Pullen*, 152 Mo. 434, 53 S. W. 1086; *Holtz v. Dick*, 42 Ohio St. 23, 51 Am. Rep. 791; *Zelliff v. Jennings*, 61 Tex. 458; *Kellar v. James*, 63 W. Va. 139, 59 S. E. 939, 14 L. R. A. (N. S.) 1003.

²⁰⁴ *Martin v. Robson*, 65 Ill. 129, 139, 16 Am. Rep. 578, per Thornton, J. To the same effect, *Schuler v. Henry*, 42 Colo. 367, 94 Pac. 360, 14 L. R. A. (N. S.) 1009; *Norris v. Corkill*, 32 Kan. 409, 4 Pac. 862, 49 Am. Rep. 489; *Harris v. Webster*, 58 N. H. 481; *Lane v. Bryant*, 100 Ky. 138, 37 S. W. 584, 18 Ky. Law Rep. 658, 36 L. R. A. 709; *Goken v. Dallugge*, 72 Neb. 16, 99 N. W. 818, 101 N. W. 244, 103 N. W. 287, 9 Ann. Cas. 1222; *Culmer v. Wilson*, 13 Utah, 129, 44 Pac. 833, 57 Am. St. Rep. 713.

²⁰⁵ *Quilty v. Battle*, 135 N. Y. 201, 32 N. E. 47, 17 L. R. A. 521, holding that, under the married woman's act as it then was, a wife was alone liable for injuries inflicted by a vicious dog kept upon premises owned by her. To the same effect, *Mayhew v. Burns*, 103 Ind. 328, 2 N. E. 793; *D. Wolff & Co. v. Lozier*, 68 N. J. Law, 103, 52 Atl. 303; *Rowe v. Smith*, 45 N. Y. 230. *C. F. Flesh v. Lindsay*, 115 Mo. 1, 21 S. W. 907, 37 Am. St. Rep. 374; *Strouse v. Leipf*, 101 Ala. 433, 14 South. 667, 23 L. R. A. 622, 46 Am. St. Rep. 122.

SERVANTS AND AGENTS

- 46. Servants are responsible to their masters and agents to their principals for their tortious acts and for neglect whereby loss has been occasioned. They are in general liable to third parties for malfeasance or for misfeasance in the discharge of their duties, but not, as some courts hold, for mere nonfeasance.**

Since there is no difference between the individual tort liability of servant or agent, no distinction has been made between them, and the words are here used interchangeably.

First, as to liability to the employer: While it has been said that there is an implied agreement by the servant to abstain from conduct prejudicial to the employer's interest, it is evident that cases of wrongdoing towards the master, which are made the basis of actions in tort, do not depend for their determination upon any rules peculiarly applicable to the relationship, though the opportunity for wrongdoing may have been created thereby.²⁰⁶ If a servant deliberately assault a master, defame him, or detain his goods,²⁰⁷ the act is neither more nor less a tort than if committed against a stranger. It is true that in cases of conversion of property intrusted to the servant, arising out of acts committed contrary to the nature of his possession, the instructions of the master may be of importance; but so may the terms of any bailment.²⁰⁸ Such wrongs, therefore, call for no discussion at this time. So the servant will be responsible to the master for injuries due to negligence upon the principles applicable generally to this tort.²⁰⁹ The master's right

²⁰⁶ See *Bixby v. Parsons*, 49 Conn. 483, 44 Am. Rep. 246. Here the employer, having been sued for wages, was permitted to recoup damages for the seduction of his daughter by the servant.

²⁰⁷ *Greenleaf v. Egan*, 30 Minn. 316, 15 N. W. 254.

²⁰⁸ See *infra*, p. 378.

²⁰⁹ *Whisten v. Brengal*, 16 Misc. Rep. 37, 37 N. Y. Supp. 813; *Mobile & M. Ry. Co. v. Clanton*, 59 Ala. 392, 31 Am. Rep. 15; *Gilson v. Collins*, 66 Ill. 136; *Zulkee v. Wing*, 20 Wis. 408, 91 Am. Dec. 425.

to indemnity where he has been forced to compensate third persons for injuries sustained through the servant's acts or neglect will be discussed later.²¹⁰

Second, concerning responsibility towards third parties, including coservants: For malfeasance, or the doing of an act inherently unlawful, and for misfeasance, or the doing improperly of a lawful act, it is thoroughly established that the servant is liable. Thus one who represents the owner of property, and who is guilty of fraud in bringing about its sale, is responsible to the purchaser;²¹¹ the employé of a sewing machine company, who takes from a married woman a sewing machine and a sum of money, both belonging to the husband, in exchange for a new machine, is liable to the husband for conversion;²¹² and one injured by a fence unlawfully placed across a public highway may have recovery against the manager of a railway who placed it there.²¹³ The direction of a superior will constitute no excuse.²¹⁴ There is, however, an exception to the general rule in cases where a servant or agent has in good faith and with no notice of an adverse title merely acted as the custodian of property or has transported it; the custody or transport being at the command of one in apparent control.²¹⁵ Such acts, as will be seen later, do not constitute conversion.²¹⁶

²¹⁰ See *infra*, p. 238.

²¹¹ *Clark v. Lovering*, 37 Minn. 120, 33 N. W. 776; *Warren v. Banning*, 67 Hun, 649, 21 N. Y. Supp. 883, affirmed 140 N. Y. 227, 35 N. E. 428.

²¹² *Rice v. Yocum*, 155 Pa. 538, 26 Atl. 698.

²¹³ *Blue v. Briggs*, 12 Ind. App. 105, 39 N. E. 885. To the same effect, *Porter v. Thomas*, 23 Ga. 467; *Englert v. New Orleans Ry. & Light Co.*, 128 La. 473, 54 South. 963; *Corliss v. Keown*, 207 Mass. 149, 93 N. E. 143; *Horner v. Lawrence*, 37 N. J. Law, 46; *Bruff v. Mali*, 36 N. Y. 200, 34 How. Prac. 338.

²¹⁴ The command of a captain is no justification for an unlawful assault committed by the mates upon a sailor. *Brown v. Howard*, 14 Johns. (N. Y.) 119. To the same effect, *Bennett v. Ives*, 30 Conn. 329; *Josselyn v. McAllister*, 22 Mich. 300; *Mill v. Hawker*, L. R. 10 Exch. 92.

²¹⁵ *Burditt v. Hunt*, 25 Me. 419, 43 Am. Dec. 289; *Metcalf v. McLaughlin*, 122 Mass. 84.

²¹⁶ See *infra*, p. 377.

Whatever doubt may originally have been expressed as to the right of one servant "to maintain an action against another for negligence whilst engaged in their common employment,"²¹⁷ it is now generally held that he may recover.²¹⁸ It should be emphasized, however, that the employé must have been personally at fault. It is his own conduct which is in question, not the conduct of the common employer.²¹⁹

But it would be unsafe to state as an established rule that the servant or agent is responsible for his negligence to others than his employer, without calling attention to the distinction which has been drawn between misfeasance and nonfeasance. For the former he is liable; for the latter it has been said he is not. The doctrine appears to have sprung from a remark by Lord Holt in *Lane v. Cotton*,²²⁰ and it has been followed by a number of the courts,²²¹

²¹⁷ *Southcote v. Stanley*, 1 Hurl. & N. 247, 250. This case concerned the right of one visiting an innkeeper to recover for injuries sustained by reason of the defective condition of the premises. It is not an authority on the present point. *Albro v. Jaquith*, 4 Gray (Mass.) 99, 64 Am. Dec. 56, overruled by *Osborne v. Morgan*, 130 Mass. 102, 39 Am. Rep. 437. And see *Burns v. Pethcal*, 75 Hun, 437, 27 N. Y. Supp. 499.

²¹⁸ *Hinds v. Harbou*, 58 Ind. 121; *Hare v. McIntire*, 82 Me. 240, 19 Atl. 453, 17 Am. St. Rep. 476, 8 L. R. A. 450; *Osborne v. Morgan*, 130 Mass. 102, 39 Am. Rep. 437; *Durkin v. Kingston Coal Co.*, 171 Pa. 193, 33 Atl. 237, 29 L. R. A. 808, 50 Am. St. Rep. 801.

²¹⁹ The servant is not liable merely because the employer has failed to adopt reasonably safe methods for the general conduct of the business. *Gustafson v. Chicago, R. I. & P. Ry. Co. (C. C.)* 128 Fed. 85. In *Atkins v. Field*, 89 Me. 281, 36 Atl. 375, 56 Am. St. Rep. 424, where the action was against a fellow servant for negligence in erecting a derrick and in selecting the materials therefor, though a verdict for plaintiff was sustained, it was considered that there would have been no liability, had defendant "simply executed the will of a lawful superior as to details of mode and material."

²²⁰ 12 Mod. 472, 488, 88 Eng. Rep. 1458. "A servant or deputy, quatenus such cannot be charged for neglect, but the principal only

²²¹ *Reid v. Humber*, 49 Ga. 207; *Henshaw v. Noble*, 7 Ohio St. 226; *Labadie v. Hawley*, 61 Tex. 177, 48 Am. Rep. 278, and see cases cited in note—concerning the liability of an agent in charge of property.

though there appears to be an increasing tendency to discard it. It rests upon the theory that a third party cannot hold the servant accountable, owing to a lack of privity between them. He is not in a position to insist upon the doing of an act, for the servant has obligated himself only to the master for its performance. Unfortunately the boundary between nonfeasance and misfeasance is frequently exceedingly difficult to determine. The test of liability, it has been said, is whether the duty rested upon the servant in his individual character and was imposed upon him independently of his employment, for if such is the case he is responsible.²²² Applying it, the court held that a foreman in charge was not liable for his failure to direct a laborer not to work at a particular place, or for not warning him of the danger of working there.²²³ In another case from the same state a similar conclusion was reached, where defendants had been appointed a committee of the board of directors of a corporation to put certain grounds in condition for a game of football, and plaintiff was injured through the defective construction of a grand stand erected under their supervision.²²⁴ Such an application of the doctrine, and inferentially the principle itself, has encountered strong opposition.²²⁵ Particularly is this true in cases where the injury arose out of the agent's failure to make repairs on property which the principal had intrusted to him for management.²²⁶

shall be charged for it; but for a misfeasance, an action will lie against a servant or deputy, but not quatenus a deputy or servant, but as a wrongdoer." But here the question was not as to the liability of the servant, but concerned that of the employer—a public officer.

²²² *Burns v. Pethcal*, 75 Hun, 437, 443, 27 N. Y. Supp. 499.

²²³ *Burns v. Pethcal*, *supra*.

²²⁴ *VAN ANTWERP v. LINTON*, 89 Hun, 417, 35 N. Y. Supp. 318, *Chapin Cas. Torts*, 83, affirmed 157 N. Y. 716, 53 N. E. 1133. And see *Potter v. Gilbert*, 130 App. Div. 632, 115 N. Y. Supp. 425; *Colvin v. Holbrook*, 2 N. Y. 126; *Denny v. Manhattan Co.*, 2 Denio (N. Y.) 115, affirmed 5 Denio (N. Y.) 639.

²²⁵ *Mayer v. Thompson-Hutchison Bldg. Co.*, 104 Ala. 611, 16 South. 620, 28 L. R. A. 433, 53 Am. St. Rep. 88; *Ellis v. Southern R. Co.*, 72 S. C. 465, 52 S. E. 228, 2 L. R. A. (N. S.) 378.

²²⁶ Responsibility of the agent *upheld* in *Baird v. Shipman*, 132

It is quite possible, of course, to assume an instance of nonfeasance for which the agent would not be accountable to a third party. Such would have been the case in *Van Antwerp v. Linton*,²²⁷ had the defendants failed to take any steps towards putting the grounds in condition. But they did not remain passive. On the contrary, they actively undertook the erection of the grand stand, and the injury arose out of the improper way in which they did it. To say that because there was a failure to exercise care there was necessarily nonfeasance, and because there was nonfeasance the agents were not liable, seems almost hair-splitting.²²⁸ Take another possible case. Suppose, instead of merely directing the defendants to put the grounds in condition, the employer had turned over to them the full possession, management, and control, not merely so far as might be necessary for the making of the improvements and repairs, but for all purposes. Would not the acceptance of the power of control have entailed corresponding responsibilities? Then suppose the defendants had improperly failed to make any repairs at all upon an existing grand stand, and a spectator or one passing along the public street had been injured by its fall. Surely the obligation of the agents in the last two cases is not strictly contractual. True, no law required

Ill. 16, 23 N. E. 384, 7 L. R. A. 128, 22 Am. St. Rep. 504, *Campbell v. Portland Sugar Co.*, 62 Me. 552, 16 Am. Rep. 503, *LOUGH v. DAVIS*, 30 Wash. 204, 70 Pac. 491, 59 L. R. A. 802, 94 Am. St. Rep. 848, *Chapin Cas. Torts*, 85, Id. 35 Wash. 449, 77 Pac. 732; *denied* in *Dean v. Brock*, 11 Ind. App. 507, 38 N. E. 829, *Delaney v. Rochereau*, 34 La. Ann. 1123, 44 Am. Rep. 456, *Feltus v. Swan*, 62 Miss. 415, *Drake v. Hagan*, 108 Tenn. 265, 67 S. W. 470. See *Lottman v. Barnett*, 62 Mo. 159, where there was a want of skill in the erection of a building. So an agent having the entire control of the erection of a building is liable for injuries resulting from an omission to replace a portion of the sidewalk, which had been removed by an employé contrary to his orders. *Ellis v. McNaughton*, 76 Mich. 237, 42 N. W. 1113, 15 Am. St. Rep. 308. To the same effect, where a superior servant ordered an inferior to work in a dangerous place, *Jewell v. Kansas City Bolt & Nut Co.*, 231 Mo. 176, 132 S. W. 703, 140 Am. St. Rep. 515.

²²⁷ *VAN ANTWERP v. LINTON*, *supra*, note 224.

²²⁸ Paralleled, however, in *Bell v. Josselyn*, 3 Gray (Mass.) 309, 63 Am. Dec. 741.

them to take it upon themselves in the first place; but, having done so, must they not proceed with due regard to the rights of others? Is this not an individual obligation placed upon every man, whether he act for himself or for another?²²⁹ Cases such as these serve to illustrate the danger of testing plaintiff's right of recovery by attempting to classify defendant's wrong as misfeasance or nonfeasance.²³⁰ It would seem more pertinent to inquire whether he has entered upon the performance of a task of such a character that in the doing thereof injury may reasonably be expected to result to third parties unless proper care should be observed. The task may cover a comparatively short time, such as the building of a house, or it may extend over a longer period, as the management of an estate or a business.²³¹ The inquiry, therefore, would seem to be: First, what is the extent of the task? Second, has he enter-

²²⁹ Cf. *LOUGH v. DAVIS*, *supra*; *Baird v. Shipman*, *supra*; *Ellis v. McNaughton*, 76 Mich. 237, 42 N. W. 1113, 15 Am. St. Rep. 308. In Massachusetts, where at one time the doctrine was applied in all its harshness (*Albro v. Jaquith*, 4 Gray, 99, 64 Am. Dec. 56; and see *Bell v. Josselyn*, 3 Gray, 309, 63 Am. Dec. 741), the tendency would now seem to be towards a more liberal view (*Osborne v. Morgan*, 130 Mass. 102, 39 Am. Rep. 437; *Breen v. Field*, 157 Mass. 277, 31 N. E. 1075; see, however, *Brown Paper Co. v. Dean*, 123 Mass. 267).

²³⁰ "It is often said in the books that an agent is responsible to third persons for misfeasance only, and not for nonfeasance; and it is doubtless true that, if an agent never does anything towards carrying out his contract with his principal, but wholly omits and neglects to do so, the principal is the only person who can maintain an action against him for the nonfeasance. But if the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequence of his acts; and he cannot, by abandoning its execution midway and leaving things in a dangerous condition, exempt himself from liability to any person who suffers injury by reason of his having so left them without proper safeguards. This is not nonfeasance, or doing nothing; but it is misfeasance, doing improperly." *Osborne v. Morgan*, 130 Mass. 102, 103, 39 Am. Rep. 437.

²³¹ Suppose the general manager of a railroad so carelessly conducts its affairs intrusted to him that a wreck results, why should not an injured passenger be permitted to recover against him?

ed upon its performance? Third, has he exercised care commensurate with the danger to be apprehended while engaged in carrying it out? The question is so broad in scope that it is well nigh, if not quite, impossible to formulate a sufficiently comprehensive rule.

MASTERS ²³²

47. The law places upon the master the duty of exercising reasonable care not to expose the servant to unnecessary risk. More specifically, such care must be exercised—

- (a) To provide safe tools, machinery, and places to work and to keep them safe;
- (b) To provide a sufficient number of competent fellow servants;
- (c) To promulgate rules necessary for the safety of employes and to secure their observance;
- (d) To warn the inexperienced servant of a danger which he is not likely to appreciate.

When Does the Relation Exist?

Although the relation of master and servant is contractual in its origin, the law imposes upon the former certain obligations towards the latter, for the nonobservance of which an action lies in tort. These he cannot delegate and thereby escape responsibility.²³³ But he is not an insurer of the servant's safety, and reasonable care is the standard by which his conduct is to be measured,²³⁴ though as will be seen hereafter, the adoption of certain precautions has in some states been made mandatory by statute.

²³² For liability of the master to third parties for acts or neglect of the servant, see *infra*, p. 209 et seq.

²³³ See *infra*, pp. 180, 191-193.

²³⁴ *Fosburg v. Phillips Fuel Co.*, 93 Iowa, 54, 61 N. W. 400; *O'Driscoll v. Faxon*, 156 Mass. 527, 31 N. E. 685; *Michigan Cent. R. Co. v. Dolan*, 32 Mich. 510; *Slater v. Jewett*, 85 N. Y. 61, 39 Am. Rep. 627; *Wannamaker v. Burke*, 111 Pa. 423, 2 Atl. 500; *Bertha Zinc Co. v. Martin's Adm'r*, 93 Va. 791, 22 S. E. 869, 70 L. R. A. 999.

It must be made to appear that the relation of master and servant existed at the time; and since this presupposes an understanding of both parties to that effect, if he who is injured is a mere volunteer, the master's duty toward him is only such as he owes to all strangers.²³⁵ It is not sufficient that there was a previous request by one who was in the master's employ, unless it likewise appears that he had authority to make it.²³⁶ Such authority, however, may be implied from the necessity of the case. Exigencies may arise requiring a servant to act in the absence of his master and for the immediate protection of his interests. Such acts, though they transcend the servant's general authority, will be deemed to have been authorized. Thus, where the driver of a horse car, finding his way blocked and being unable to return to a switch without assistance, called for aid, one who responded was not regarded as a volunteer;²³⁷ and a like conclusion was reached where derailment or collision was imminent.²³⁸

One will be none the less a volunteer, though the parties occupied the position of master and servant, if he was not then acting in the course of his employment, as where he acts outside his regular duty in undertaking to make repairs,²³⁹ to fetch materials,²⁴⁰ to assist another employé,²⁴¹

²³⁵ *Manchester Mfg. Co. v. Polk*, 115 Ga. 542, 41 S. E. 1015; *New Orleans, J. & G. N. R. Co. v. Harrison*, 48 Miss. 112, 12 Am. Rep. 356.

²³⁶ Authority not shown: *Sparks v. East Tennessee, V. & G. Ry. Co.*, 82 Ga. 156, 8 S. E. 424; *Everhart v. Terre Haute & I. R. Co.*, 78 Ind. 292, 41 Am. Rep. 567; *Shea v. Gurney*, 163 Mass. 184, 39 N. E. 996, 47 Am. St. Rep. 446; *Longa v. Stanley Hod Elevator Co.*, 69 N. J. Law, 31, 54 Atl. 251. Authority implied: *Sloan v. Central Iowa Ry. Co.*, 62 Iowa, 728, 16 N. E. 331.

²³⁷ *Marks v. Rochester R. Co.*, 77 Hun, 77, 26 N. Y. Supp. 314, reversed because negligence not proven 146 N. Y. 181, 40 N. E. 782.

²³⁸ *Louisville & N. R. Co. v. Ginley*, 100 Tenn. 472, 45 S. W. 348.

²³⁹ *Mellor v. Merchants' Mfg. Co.*, 150 Mass. 362, 23 N. E. 100, 5 L. R. A. 792; *Lindstrand v. Delta Lumber Co.*, 65 Mich. 254, 32 N. W. 427. But see *Whitehead v. Reader* (1901) L. R. 2 K. B. 48, 65 J. P. 403, 70 L. J. K. B. 546, 84 L. T. Rep. N. S. 514, 49 Wkly. Rep. 562.

²⁴⁰ *Neff v. Broom*, 70 Ga. 256.

²⁴¹ *Louisville & N. R. Co. v. Pendleton's Adm'r*, 126 Ky. 605, 104 S. W. 382, 31 Ky. Law Rep. 1025; *Parent v. Nashua Mfg. Co.*, 70 N. H. 199, 47 Atl. 261.

or otherwise.²⁴² The relation of master and servant is deemed temporarily suspended. The master owes no obligation to the servant "to anticipate his deviation from his duty, and the possible danger which may arise to him therefrom, and to provide against it. He [the servant] takes things as he finds them, and suffers all consequences of his own error, and cannot make the master liable therefor."²⁴³ It is otherwise, however, if what he did was at the direction of the master or of one authorized to act in the master's place.²⁴⁴

It is not determinative that the alleged employé either received no pay at all,²⁴⁵ or received none for his time when the injury occurred.²⁴⁶ Nor are the hours fixed for work controlling. True, the employer's duty would not begin with the arrival of an employé who might, for purposes of his own, come an unreasonable time before work was to commence, nor would it continue when work was over, for as long as he chooses to stay.²⁴⁷ On the other hand, liability neither commences nor ends with the stroke of the

²⁴² *Allen v. Hixson*, 111 Ga. 460, 36 S. E. 810; *Moran v. Rockland, T. & C. St. Ry.*, 99 Me. 127, 58 Atl. 676; *Wagen v. Minneapolis & St. L. R. Co.*, 80 Minn. 92, 82 N. W. 1107; *McGill v. Maine & N. H. Granite Co.*, 70 N. H. 125, 46 Atl. 684, 85 Am. St. Rep. 618.

²⁴³ *Louisville & N. R. Co. v. Pendleton's Adm'r*, 126 Ky. 605, 615, 104 S. W. 382, 31 Ky. Law Rep. 1025; *Patterson v. North Carolina Lumber Co.*, 145 N. C. 42, 44, 58 S. E. 437, citing *Thomp. on Negligence*, § 4677.

²⁴⁴ *Broderick v. Detroit Union R. R. Station & Depot Co.*, 56 Mich. 261, 22 N. W. 802, 56 Am. Rep. 382; *Krueger v. Bartholomay Brewing Co.*, 94 App. Div. 58, 87 N. Y. Supp. 1054.

²⁴⁵ As in the case of a minor whose wages are collected by his parent. *Tennessee Coal, Iron & R. Co. v. Hayes*, 97 Ala. 201, 12 South. 98; *Chicago W. & V. Coal Co. v. Moran*, 210 Ill. 9, 71 N. E. 38.

²⁴⁶ A workman who is paid by the hour does not cease to be in the master's employ during the hour allowed to him for lunch, though he receives no pay for that time. *Heldmaier v. Cobbs*, 195 Ill. 172, 62 N. E. 853; *Blovelt v. Sawyer* (1894) L. R. 1 K. B. 271, 68 J. P. 110, 73 L. J. K. B. 155, 89 L. T. Rep. N. S. 658, 20 T. L. R. 105, 52 Wkly. Rep. 503.

²⁴⁷ *Smith v. South Normanton Colliery Co.* (1903) L. R. 1 K. B. 204, 67 J. P. 381, 72 L. J. K. B. 76, 88 L. T. Rep. N. S. 5, 51 Wkly. Rep. 209.

clock. It seems sufficient to allow to the servant a reasonable time beforehand, whether his early arrival is prompted by a desire to be punctual, or to prepare himself or his tools for work,²⁴⁸ and a reasonable time afterward in which to remove the evidences of his toil.²⁴⁹ Ordinarily he will not be treated as an employé while going to or returning from work,²⁵⁰ though it is otherwise where he suffers injury while passing over a portion of the master's premises used with the latter's permission as a means of access to the scene of his labor,²⁵¹ or while being conveyed there or thence by the master pursuant to the contract of service,²⁵² or with the master's acquiescence and by a method of conveyance furnished by him.²⁵³

As it is essential to the existence of the relation that there should be a right of control vested in the master, it is evident that, in general, the employer of an independent contractor assumes none of the responsibilities towards the latter's servants.²⁵⁴ He may, however, render himself responsible if he has undertaken to furnish machinery, appliances, labor, or place to work,²⁵⁵ or reserved control over

²⁴⁸ *Walbert v. Trexler*, 156 Pa. 112, 27 Atl. 65.

²⁴⁹ *Helmke v. Thilmany*, 107 Wis. 216, 83 N. W. 360.

²⁵⁰ See *Baltimore & O. R. Co. v. State, to Use of Trainor*, 33 Md. 542.

²⁵¹ *Beck v. Southern Ry. Co.*, 146 N. C. 455, 59 S. E. 1015; *Ewald v. Chicago & N. W. Ry. Co.*, 70 Wis. 420, 36 N. W. 12, 591, 5 Am. St. Rep. 178.

²⁵² *Fitzpatrick v. New Albany & S. R. Co.*, 7 Ind. 436; *Gilshannon v. Stony Brook R. Corp.*, 10 Cush. (Mass.) 228; *Vick v. New York Cent. & H. R. R. Co.*, 95 N. Y. 267, 47 Am. Rep. 36.

²⁵³ *Birmingham Ry., Light & Power Co. v. Sawyer*, 156 Ala. 199, 47 South. 67, 19 L. R. A. (N. S.) 717; *Wilson v. Banner Lumber Co.*, 108 La. 590, 32 South. 460; *Gilshannon v. Stony Brook R. Corp.*, *supra*.

²⁵⁴ *Laffery v. United States Gypsum Co.*, 83 Kan. 349, 111 Pac. 498, 45 L. R. A. (N. S.) 930, Ann. Cas. 1912A, 590; *Petrie v. J. Henry Small Realty Co.*, 141 App. Div. 681, 125 N. Y. Supp. 937.

²⁵⁵ *McCall v. Pacific Mail Steamship Co.*, 123 Cal. 42, 55 Pac. 706; *Mulchey v. Methodist Religious Soc.*, 125 Mass. 487; *Lake Superior Iron Co. v. Erickson*, 39 Mich. 492, 33 Am. Rep. 423; *Coughtry v. Globe Woolen Co.*, 56 N. Y. 124, 15 Am. Rep. 387.

the method to be pursued, or in fact assumed control.²⁵⁶ This will be considered more fully when liability for the default of a contractor is discussed.²⁵⁷ An analogous case is where the servant has been loaned to another master for some special service. This may work a discontinuance of his former relation and the assumption of a new one. The result is accomplished when he no longer continues liable to the direction and control of the master, but becomes subject to the party to whom he is loaned.²⁵⁸

It now becomes necessary to consider the master's duties in detail.

(a) To Provide Safe Tools, Machinery, and Places to Work

The master, not being an insurer, and being bound only to exercise reasonable care, is not bound to provide the best and safest or newest appliances.²⁵⁹ He will not be liable merely because better might have been obtained, provided he furnished such as can with reasonable care be used without danger.²⁶⁰ It will be sufficient if he has supplied such as are in common use for the same purpose,²⁶¹ although a safer device may have been invented, where it has not become generally known as of practical utility.²⁶²

²⁵⁶ *Anderson v. Foley Bros.*, 110 Minn. 151, 124 N. W. 987; *Speed v. Atlantic & P. R. Co.*, 71 Mo. 303; *Midgette v. Branning Mfg. Co.*, 150 N. C. 333, 64 S. E. 5.

²⁵⁷ See *infra*, p. 214 et seq.

²⁵⁸ *Grace & Hyde Co. v. Probst*, 208 Ill. 147, 70 N. E. 12. See *Higgins v. Western Union Tel. Co.*, 156 N. Y. 75, 50 N. E. 500, 66 Am. St. Rep. 537; *Bauer v. Richter*, 103 Wis. 412, 79 N. W. 404. See *Standard Oil Co. v. Anderson*, 212 U. S. 215, 29 Sup. Ct. 252, 53 L. Ed. 480.

²⁵⁹ *Rooney v. Sewall & Day Cordage Co.*, 161 Mass. 153, 36 N. E. 789; *Harley v. Buffalo Car Mfg. Co.*, 142 N. Y. 31, 36 N. E. 813; *La Pierre v. Chicago & G. T. Ry. Co.*, 99 Mich. 212, 58 N. W. 60; *Washington & G. R. Co. v. McDade*, 135 U. S. 554, 570, 10 Sup. Ct. 1044, 34 L. Ed. 235.

²⁶⁰ *Lehigh & Wilkes-Barre Coal Co. v. Hayes*, 128 Pa. 294, 18 Atl. 387, 5 L. R. A. 441, 15 Am. St. Rep. 680; *Stringham v. Hilton*, 111 N. Y. 188, 18 N. E. 870, 1 L. R. A. 483.

²⁶¹ *Tompkins v. Marine Engine & Mach. Co.*, 70 N. J. Law, 330, 58 Atl. 393; *Leonard v. Herrmann*, 195 Pa. 222, 45 Atl. 723; *Innes v. City of Milwaukee*, 96 Wis. 170, 70 N. W. 1064.

²⁶² *Lorimer v. St. Paul City Ry. Co.*, 48 Minn. 391, 51 N. W. 125.

Indeed, he will be liable if, by introducing an untried novelty, he has failed to measure up to the standard of reasonable care.²⁶³ As the question involved is one of negligence, it is apparent that each case must largely be a law unto itself. Ordinarily it is to be determined by the jury.²⁶⁴ It will not be enough for the servant to show that the appliance was defective. He must go further, and prove that the master knew of the defect, or could have discovered it by reasonable inspection,²⁶⁵ and the degree of caution must necessarily be proportionate to the danger.²⁶⁶

The employer's duty is not fulfilled when he has provided an appliance which was originally safe. He must exercise proper care to see that it so continues;²⁶⁷ but a failure to repair does not necessarily import negligence unless and until there has been a reasonable opportunity to remedy the defect after discovery.²⁶⁸ Furthermore, although the general rule is that the master cannot delegate the performance of his duties,²⁶⁹ there is an exception in the case of ordinary

²⁶³ *Marshall v. Widdicombe Furniture Co.*, 67 Mich. 167, 34 N. W. 541, 11 Am. St. Rep. 573.

²⁶⁴ See *McAlpine v. Laydon*, 115 Cal. 68, 46 Pac. 865; *Union Bridge Co. v. Teehan*, 190 Ill. 374, 60 N. E. 533; *Graham v. Boston & A. R. Co.*, 156 Mass. 4, 30 N. E. 359; *Jacobson v. Johnson*, 87 Minn. 185, 91 N. W. 465; *Welle v. Celluloid Co.*, 175 N. Y. 401, 67 N. E. 609; *Winters v. Boll*, 204 Pa. 41, 53 Atl. 529.

²⁶⁵ *Roughan v. Boston & Lockport Block Co.*, 161 Mass. 24, 36 N. E. 461; *Painton v. Northern Cent. Ry. Co.*, 83 N. Y. 7; *Hammond Co. v. Johnson*, 38 Neb. 244, 56 N. W. 967; *Westinghouse Electric & Mfg. Co. v. Heimlich*, 127 Fed. 92, 62 C. C. A. 92.

²⁶⁶ *Welle v. Celluloid Co.*, 175 N. Y. 401, 67 N. E. 609. Thus, an elevator being in many respects a dangerous machine, the employer controlling its operation is required to use great care and caution. *Wise v. Ackerman*, 76 Md. 375, 25 Atl. 424.

²⁶⁷ *Rincicotti v. O'Brien Contracting Co.*, 77 Conn. 617, 60 Atl. 115, 69 L. R. A. 936; *McDonald v. Michigan Cent. R. Co.*, 108 Mich. 7, 65 N. W. 597; *Cole v. Warren Mfg. Co.*, 63 N. J. Law, 626, 44 Atl. 647; *Bailey v. Rome, W. & O. R. Co.*, 139 N. Y. 302, 34 N. E. 918; *Houston v. Brush*, 66 Vt. 331, 29 Atl. 380; *Union Pac. Ry. Co. v. Daniels*, 152 U. S. 684, 14 Sup. Ct. 756, 38 L. Ed. 597.

²⁶⁸ *Seaboard Mfg. Co. v. Woodson*, 98 Ala. 378, 11 South. 733.

²⁶⁹ *Mullin v. California Horseshoe Co.*, 105 Cal. 77, 38 Pac. 535; *Moynihan v. Hills Co.*, 146 Mass. 586, 16 N. E. 574, 4 Am. St. Rep. 848; *Morton v. Detroit, B. C. & A. R. Co.*, 81 Mich. 423, 46 N. W.

repairs to be made by the servant as a detail of his work with materials furnished by the master, where they are within his capacity and their necessity springs from the daily use of the appliance, occurs at different and unknown periods of the service, and is open to his observation in the absence of the master.²⁷⁰ The doctrine is somewhat difficult of application, and it should be emphasized: (a) That the repairs are necessitated merely by ordinary wear and tear; (b) that they do not require skill and knowledge beyond what is needed in operating the machine; and (c) the materials necessary for making them are available to the servant.²⁷¹

The duty to provide a safe place to work is governed by rules similar to those which determine liability with respect to supplying tools and machinery. Reasonable care is all that is required, and this necessarily means, not only that the master must be liable where he actually knows of the danger, but also where he should have known of it in the exercise of proper diligence.²⁷² There can be no responsibility merely because the place does not respond to a

111; *Bailey v. Rome, W. & O. R. Co.*, 139 N. Y. 302, 34 N. E. 918; *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. 590, 29 L. Ed. 755.

²⁷⁰ Thus the master is not responsible for damages due to the breaking of a holisting rope, where he kept on hand a sufficient number of the most approved kind, which were supplied when called for, and the rope in use was in full view of the employé, and would disclose any approaching weakness. *Cregan v. Marston*, 126 N. Y. 568, 27 N. E. 952, 22 Am. St. Rep. 854. To the same effect, *Johnson v. Boston Towboat Co.*, 135 Mass. 209, 46 Am. Rep. 458.

²⁷¹ See *Jaques v. Great Falls Mfg. Co.*, 66 N. H. 482, 22 Atl. 552, 13 L. R. A. 824; *Webber v. Piper*, 109 N. Y. 496, 17 N. E. 216. Thus the master is not liable for injuries due to failure to oil a machine. *Quigley v. Levering*, 167 N. Y. 58, 60 N. E. 276, 54 L. R. A. 62. Contra, where he failed to provide means for the oiling. *Prescott v. Ottman Lithographing Co.*, 20 App. Div. 397, 46 N. Y. Supp. 812.

²⁷² *Armour v. Golkowska*, 202 Ill. 144, 68 N. E. 1037; *Buehner v. Creamery Package Mfg. Co.*, 124 Iowa, 445, 100 N. W. 345, 104 Am. St. Rep. 354; *Burns v. Delaware & A. Tel. & Tel. Co.*, 70 N. J. Law, 745, 59 Atl. 220, 592, 67 L. R. A. 956; *McGuire v. Bell Tel. Co.*, 167 N. Y. 208, 60 N. E. 433, 52 L. R. A. 437; *Butterman v. McClintic-Marshall Const. Co.*, 206 Pa. 82, 55 Atl. 839.

test which was not to have been anticipated,²⁷³ or where the injured servant had himself prepared it, or had undertaken to supervise its condition and remedy defects,²⁷⁴ or where the injury occurred at a locality where the employé was not required to be for the purposes of his employment.²⁷⁵

(b) To Provide a Sufficient Number of Competent Fellow Servants

If the employer knew or could by the exercise of reasonable care have ascertained the unfitness of the fellow servant whose act or neglect brought about the injury, he will be responsible, whether such unfitness arose from unskillfulness,²⁷⁶ drunkenness,²⁷⁷ habitual negligence,²⁷⁸ or other cause.²⁷⁹ The degree of care must be proportionate to the exigencies of the particular service and reasonably commensurate with the perils and hazards likely to be encoun-

²⁷³ *Preston v. Chicago & W. M. Ry. Co.*, 98 Mich. 128, 57 N. W. 31.

²⁷⁴ *McGorty v. Southern New England Tel. Co.*, 69 Conn. 635, 38 Atl. 359, 61 Am. St. Rep. 62; *Broderick v. St. Paul City Ry. Co.*, 74 Minn. 163, 77 N. W. 28; *Armour v. Hahn*, 111 U. S. 313, 4 Sup. Ct. 433, 28 L. Ed. 440. And see *Thayer v. Smoky Hollow Coal Co.*, 121 Iowa, 121, 96 N. W. 718.

²⁷⁵ *Kennedy v. Chase*, 119 Cal. 637, 52 Pac. 33, 63 Am. St. Rep. 153.

²⁷⁶ *McElligott v. Randolph*, 61 Conn. 157, 22 Atl. 1094, 29 Am. St. Rep. 181; *Evansville & T. H. R. Co. v. Guyton*, 115 Ind. 450, 17 N. E. 101, 7 Am. St. Rep. 458; *Neilon v. Kansas City, St. J. & C. B. Ry. Co.*, 85 Mo. 599; *Mann v. Delaware & H. Canal Co.*, 91 N. Y. 495; *Wabash Ry. Co. v. McDaniels*, 107 U. S. 454, 2 Sup. Ct. 932, 27 L. Ed. 605.

²⁷⁷ *Chicago & A. R. Co. v. Sullivan*, 63 Ill. 293; *Gilman v. Eastern R. Co.*, 13 Allen (Mass.) 433, 90 Am. Dec. 210; *Hilts v. Chicago & G. T. Ry.*, 55 Mich. 437, 21 N. W. 878; *Williams v. Missouri Pac. Ry. Co.*, 109 Mo. 475, 18 S. W. 1098; *Laning v. New York Cent. R. Co.*, 49 N. Y. 521, 10 Am. Rep. 417.

²⁷⁸ *Coppins v. New York Cent. & H. R. R. Co.*, 122 N. Y. 563, 25 N. E. 915, 19 Am. St. Rep. 523; *Hughes v. Baltimore & O. R. Co.*, 164 Pa. 178, 30 Atl. 383, 44 Am. St. Rep. 597.

²⁷⁹ *Louisville & N. R. Co. v. Davis*, 91 Ala. 487, 8 South. 552 (one-armed brakemen); *Baird v. New York Cent. & H. R. R. Co.*, 64 App. Div. 14, 71 N. Y. Supp. 734, affirmed 172 N. Y. 637, 65 N. E. 1113 (epileptic brakeman).

tered in the performance of the duty.²⁸⁰ Beyond this there is no accountability.²⁸¹ Thus it has been said that a master does not owe the same care in finding out bad habits after employment as he did when the servant was first engaged;²⁸² and when notified that he has become careless, the master is not ordinarily bound to discharge him without an investigation, unless the notice is accompanied by such evidence as leaves no reasonable doubt of the truth of the charge.²⁸³ Usually the question of due care is for the jury.²⁸⁴ The obligation extends, not only to the quality of the servants, but to their reasonable quantity.²⁸⁵

(c) To Promulgate and Secure the Observance of Necessary Rules

General rules for the conduct of employés, which will afford them reasonable protection from the dangers inci-

²⁸⁰ *Western Stone Co. v. Whalen*, 151 Ill. 472, 38 N. E. 241, 42 Am. St. Rep. 244; *Hilts v. Chicago & G. T. Ry. Co.*, 35 Mich. 437, 21 N. W. 878; *Wabash Ry. Co. v. McDaniels*, 107 U. S. 454, 2 Sup. Ct. 932, 27 L. Ed. 605. The burden is on the injured servant to show the master's negligence. *Stafford v. Chicago, B. & Q. R. Co.*, 114 Ill. 244, 2 N. E. 185; *Union Pac. Ry. Co. v. Milliken*, 8 Kan. 647; *Roblin v. Kansas City, St. J. & C. B. R. Co.*, 119 Mo. 476, 24 S. W. 1011.

²⁸¹ In the following cases it was held that there was no proof that the master had failed to exercise proper care. *Beaulieu v. Portland Co.*, 48 Me. 291; *McDermott v. City of Boston*, 133 Mass. 349; *Pittsburg, Ft. W. & C. Ry. Co. v. Devinney*, 17 Ohio St. 198; *Pilkinton v. Gulf, C. & S. F. Ry. Co.*, 70 Tex. 226, 7 S. W. 805.

²⁸² "Good character and proper qualifications, once possessed, may be presumed to continue; and I see no reason why a principal may not rely upon that presumption as to these personal qualities until he has notice of a change, or knowledge of such facts as would be deemed equivalent to notice, or at least such as would put a reasonable man upon inquiry." *Chapman v. Erie Ry. Co.*, 55 N. Y. 579, 585, per Church, C. J. To the same effect, *Blake v. Maine Cent. R. Co.*, 70 Me. 60, 35 Am. Rep. 297.

²⁸³ *Lake Shore & M. S. Ry. Co. v. Stupak*, 123 Ind. 210, 23 N. E. 246.

²⁸⁴ *Western Stone Co. v. Whalen*, 151 Ill. 472, 38 N. E. 241, 42 Am. St. Rep. 244; *Tonnesen v. Ross*, 58 Hun, 415, 12 N. Y. Supp. 150, 151; *Hughes v. Baltimore & O. R. Co.*, 164 Pa. 178, 30 Atl. 383, 44 Am. St. Rep. 597.

²⁸⁵ *Peterson v. American Grass Twine Co.*, 90 Minn. 343, 96 N. W. 913; *Hilton v. Fitchburg R. Co.*, 73 N. H. 116, 59 Atl. 625, 68 L. R.

dent to the performance of their respective duties, must be promulgated ²⁸⁶ and enforced ²⁸⁷ by the master. This does not apply, however, to risks which are obvious to the employé,²⁸⁸ nor where a uniform custom is a sufficient substitute,²⁸⁹ nor where the work is simple and not attended with extra hazards, for it is only when the business is complicated, as well as dangerous, that it is the duty of the master to provide rules.²⁹⁰

(d) To Warn of Danger

This applies to latent defects and dangers not obvious, of which the master knew or ought reasonably to have known. Necessarily the experience and capacity of the servant must be considered, for what may be apparent "to a man of long experience and of a high order of intelligence may be unknown to the inexperienced and ignorant."²⁹¹

A. 428; *Flike v. Boston & A. R. Co.*, 53 N. Y. 549, 13 Am. Rep. 545; *Johnson v. Ashland Water Co.*, 71 Wis. 553, 37 N. W. 823, 5 Am. St. Rep. 243.

²⁸⁶ *Lake Shore & M. S. Ry. Co. v. Lavalley*, 36 Ohio St. 221; *Pittsburg, Ft. W. & C. Ry. Co. v. Powers*, 74 Ill. 341; *Doing v. New York, O. & W. Ry. Co.*, 151 N. Y. 579, 45 N. E. 1028; *Cooper v. Central R. of Iowa*, 44 Iowa, 134. It is the master's duty to anticipate and guard against only such accidents and casualties as might reasonably be foreseen. *Berrigan v. New York, L. E. & W. R. Co.*, 131 N. Y. 582, 30 N. E. 57.

²⁸⁷ *Fay v. Minneapolis & St. L. Ry. Co.*, 30 Minn. 231, 15 N. W. 241; *Whittaker v. President, etc., of Delaware & H. Canal Co.*, 126 N. Y. 544, 27 N. E. 1042; *Northern Pac. R. Co. v. Nickels*, 1 C. C. A. 625, 50 Fed. 718.

²⁸⁸ *Voss v. Delaware, L. & W. R. Co.*, 62 N. J. Law, 59, 41 Atl. 224. Negligence cannot be predicated upon the failure to promulgate a rule that a dangerous machine shall not be started while undergoing repair. *Austin v. Fisher Tanning Co.*, 96 App. Div. 550, 89 N. Y. Supp. 137. But see *Devoe v. New York Cent. & H. R. R. Co.*, 174 N. Y. 1, 66 N. E. 568.

²⁸⁹ *Rutledge v. Missouri Pac. Ry. Co.*, 123 Mo. 121, 24 S. W. 1053, 27 S. W. 327; *Kudik v. Lehigh Val. R. Co.*, 78 Hun, 492, 29 N. Y. Supp. 533.

²⁹⁰ *Boyer v. Eastern Ry. Co.*, 87 Minn. 367, 92 N. W. 326; *Wagner v. New York Cent. & St. L. R. Co.*, 76 App. Div. 552, 78 N. Y. Supp. 696; *Norfolk & W. Ry. Co. v. Graham*, 96 Va. 430, 31 S. E. 604.

²⁹¹ *Bohn Mfg. Co. v. Erickson*, 55 Fed. 943, 946, 5 C. C. A. 341, 344, per Sanborn, J., who added: "Hence, if the youth, inexperience, and

Thus the peril from revolving rollers²⁹² or knives may be so obvious, even to a child, that no special warning would be needed.²⁹³ The danger in quitting a cinder pit located between the rails is also apparent,²⁹⁴ or in standing upon a bench likely to tip.²⁹⁵ In such cases the inexperience of the employé does not alter the situation. If he is experienced, the master is justified in presuming that he is aware of the ordinary dangers of his employment, though they are latent in the sense that one unfamiliar with the work would not have known of them.²⁹⁶ But where, because of youthfulness or inexperience, the servant is unaware of the hidden danger, and the master must reasonably have known of this fact, his duty to give sufficient warning is clear,²⁹⁷

capacity of a minor who is employed in a hazardous occupation are such that a master of ordinary intelligence and prudence would know that he is not aware of or does not appreciate the ordinary risks of his employment, it is his duty to notify him of them and instruct him how to avoid them. This notice and instruction should be graduated to the age, intelligence, and experience of the servant. They should be such as a master of ordinary prudence and sagacity would give under like circumstances, for the purpose of enabling the minor not only to know the dangerous nature of his work, but also to understand and appreciate its risks and avoid its dangers. They should be governed, after all, more by the experience and capacity of the servant than by his age, because the intelligence and experience of men measure their knowledge and appreciation of the dangers about them far more accurately than their years."

²⁹² *McCarthy v. Mulgrew*, 107 Iowa, 76, 77 N. W. 527; *Groth v. Thomann*, 110 Wis. 488, 86 N. W. 178, cf. *Buckley v. Gutta Percha & Rubber Mfg. Co.*, 113 N. Y. 540, 21 N. E. 717.

²⁹³ Unless they created a suction unknown to him. *Bohn Mfg. Co. v. Erickson*, 55 Fed. 943, 5 C. C. A. 341.

²⁹⁴ *Chicago & A. R. Co. v. Bell*, 209 Ill. 25, 70 N. E. 754.

²⁹⁵ *Hesse v. National Casket Co.*, 66 N. J. Law, 652, 52 Atl. 384.

²⁹⁶ Thus an experienced railroad engineer will be presumed to be acquainted with the ordinary peculiarities of the road and engine. *Thain v. Old Colony R. Co.*, 161 Mass. 353, 37 N. E. 309; *Bellows v. Pennsylvania & N. Y. Canal & R. Co.*, 157 Pa. 51, 27 Atl. 685. To the same effect: *Kennedy v. Merrimack Pav. Co.*, 185 Mass. 442, 70 N. E. 437; *Saucier v. New Hampshire Spinning Mills*, 72 N. H. 292, 56 Atl. 545; *Cincinnati, N. O. & T. P. Ry. Co. v. Mealer*, 1 C. C. A. 633, 50 Fed. 725.

²⁹⁷ *Tagg v. McGeorge*, 153 Pa. 368, 26 Atl. 671, 35 Am. St. Rep. 889; *Reynolds v. Boston & M. R. Co.*, 64 Vt. 66, 24 Atl. 134, 33 Am.

and it makes no difference that the peril arises from the wrongdoing of a third party.²⁹⁸

ASSUMPTION OF RISK BY SERVANT

- 48. A servant takes upon himself the risks ordinarily incident to his occupation, including such as arise from the negligence of a fellow servant. Known hazards, or such as might have become known in the exercise of reasonable care, are likewise assumed, though not properly incident to the service.**

It is sometimes said to be assumed that the servant, when entering upon his employment, was aware of the hazard incidental thereto, and "he must be supposed to have contracted on the terms that, as between himself and his master, he would run this risk."²⁹⁹ But it is evident that this statement does not meet all cases, for the risk assumed by the servant may be such as he has become acquainted with during the term of employment, though not such as he had in contemplation at the time the service began.³⁰⁰ Furthermore, he takes upon himself, in addition to the ordinary risks incident to the business, such others as are actually known to him, or are obvious to a person possessing ordinary powers of observation.³⁰¹ In fact, though the doctrine of the assumption by an employé of the risks of his employment has usually been considered from the point of view

St. Rep. 908; *Chicago Anderson Pressed Brick Co. v. Reinneiger*, 140 Ill. 334, 29 N. E. 1106, 33 Am. St. Rep. 249; *Walsh v. Peet Valve Co.*, 110 Mass. 23; *Addicks v. Christoph*, 62 N. J. Law, 786, 43 Atl. 193, 72 Am. St. Rep. 687; *Giebell v. Collins Co.*, 54 W. Va. 518, 46 S. E. 569.

²⁹⁸ Thus, where plaintiff, a carpenter, was employed by defendant to perform labor upon the latter's premises, where he was shot by a third party, the knowledge of defendant that the work would probably be resisted forcibly imposed a duty to warn plaintiff of the hazard. *Baxter v. Roberts*, 44 Cal. 187, 13 Am. Rep. 160.

²⁹⁹ *Hutchinson v. York, N. & B. Ry. Co.*, 5 Exch. 343, 351, per Alderson, B.

³⁰⁰ *Dillenberger v. Weingartner*, 64 N. J. Law, 292, 45 Atl. 638.

³⁰¹ *Hanson v. Hammell*, 107 Iowa, 171, 77 N. W. 839; *Kaare v. Troy Steel & Iron Co.*, 139 N. Y. 369, 34 N. E. 901; *McDonald v. Standard Oil Co.*, 69 N. J. Law, 445, 55 Atl. 289; *Johnston v. Ore-*

of a contract, express or implied,³⁰² yet as applied to actions of tort for negligence brought against an employer it leads up to the broader principle, "*Volenti non fit injuria.*"³⁰³

Even a superficial examination of the cases bearing upon the doctrine of assumed risk is of course impracticable. The principle applies to instrumentalities of employment,³⁰⁴ to places,³⁰⁵ to rules,³⁰⁶ and to methods of work.³⁰⁷ It should appear either that the risk was appreciated by the servant, or was so patent that, in view of his age and experience, he should have appreciated it. His knowledge of the defect is not necessarily tantamount to knowledge of the hazard,³⁰⁸ a rule which is peculiarly applicable to cases where the work was beyond the scope of the original employment.³⁰⁹ But there can be no assumption of risk where the act of the servant was not voluntary, as in the

gon S. L. & U. N. Ry. Co., 23 Or. 94, 31 Pac. 283; Bemisch v. Roberts, 143 Pa. 1, 21 Atl. 998.

³⁰² Conway v. Furst, 57 N. J. Law, 645, 32 Atl. 380.

³⁰³ O'Maley v. South Boston Gaslight Co., 158 Mass. 135, 136, 32 N. E. 1119, 47 L. R. A. 161; Knisley v. Pratt, 148 N. Y. 372, 379, 42 N. E. 986, 32 L. R. A. 367.

³⁰⁴ Jenney Electric Light & Power Co. v. Murphy, 115 Ind. 566, 18 N. E. 30; Rooney v. Sewell & Day Cordage Co., 161 Mass. 153, 36 N. E. 789; Wheeler v. Berry, 95 Mich. 250, 54 N. W. 876; Crown v. Orr, 140 N. Y. 450, 35 N. E. 648; Green & C. St. Pass. Ry. Co. v. Bresmer, 97 Pa. 103.

³⁰⁵ Ragon v. Toledo, A. A. & N. M. Ry. Co., 97 Mich. 265, 56 N. W. 612, 37 Am. St. Rep. 336; Clark v. St. Paul & S. C. R. Co., 28 Minn. 128, 9 N. W. 581; Baylor v. Delaware, L. & W. R. Co., 40 N. J. Law, 23, 29 Am. Rep. 208; Gibson v. Erie Ry. Co., 63 N. Y. 449, 20 Am. Rep. 552; Kline v. Abraham, 178 N. Y. 377, 70 N. E. 923; McGrath v. Texas & P. Ry. Co., 9 C. C. A. 133, 60 Fed. 555.

³⁰⁶ Thus, where recovery was sought for the killing of an employé by a switch engine running at an unlawful rate of speed, evidence is admissible to prove that deceased was aware of a custom to run engines faster than the lawful rate. Abbot v. McCadden, 81 Wis. 563, 51 N. W. 1079, 29 Am. St. Rep. 910. To the same effect, there being no rules, but the danger being known, Zebrowski v. Warner Sugar Refining Co., 83 N. J. Law, 558, 83 Atl. 957.

³⁰⁷ Schultz v. Chicago & N. W. Ry. Co., 67 Wis. 616, 31 N. W. 321, 58 Am. Rep. 881.

³⁰⁸ Russell v. Minneapolis & St. L. Ry. Co., 32 Minn. 230, 20 N. W. 147; Davidson v. Cornell, 132 N. Y. 228, 30 N. E. 573.

³⁰⁹ Consolidated Coal Co. of St. Louis v. Haenni, 146 Ill. 614, 35 N. E. 162; Ferren v. Old Colony R. Co., 148 Mass. 197, 9 N. E. 608.

case of a sailor, since his disobedience might have been punished,⁸¹⁰ or of a convict, whose movements are controlled by a guard.⁸¹¹

It may appear that the servant, on discovering the danger, called the master's attention thereto, and the latter promised to remedy the defect. The continuance in service for a reasonable time thereafter in reliance upon the master's word will not amount to an assumption of risk, unless the peril is so imminent that one of ordinary prudence would have immediately discontinued work.⁸¹² Furthermore, for reasons of public policy and quite apart from any promise to repair, the servant will not thereby be deemed to have assumed the risk where his immediate discontinuance would subject the lives of others to danger.⁸¹³

Fellow Servants

Among the risks of service is that of negligence on the part of a fellow servant. Though the rule is generally upheld on this theory, it has been justified on broader grounds; for it has been said that, were it otherwise, it "would be an encouragement to the servant to omit that diligence and caution which he is in duty bound to exercise on the behalf of his master, to protect him against the misconduct or negligence of others who serve him, and which diligence and caution, while they protect the master, are a much better security against any injury the servant may sustain by the negligence of others engaged under the same master than any recourse against his master for damages could

⁸¹⁰ *Eldridge v. Atlas S. S. Co.*, 134 N. Y. 187, 32 N. E. 66.

⁸¹¹ *Chattahoochee Brick Co. v. Braswell*, 92 Ga. 631, 18 S. E. 1015.

⁸¹² *Taylor v. Felsing*, 164 Ill. 331, 45 N. E. 161; *Greene v. Minneapolis & St. L. Ry. Co.*, 31 Minn. 248, 17 N. W. 378, 47 Am. Rep. 785; *Settle v. St. Louis & S. F. R. Co.*, 127 Mo. 336, 30 S. W. 125, 48 Am. St. Rep. 633; *Dowd v. Erie R. Co.*, 70 N. J. Law, 451, 57 Atl. 248; *Curran v. A. H. Stange Co.*, 98 Wis. 598, 74 N. W. 377.

⁸¹³ Thus an engineer, who discovers that his engine has become defective, but who nevertheless remains in control to the end of his trip, was held not precluded from recovery. *Olney v. Boston & M. R. R.*, 71 N. H. 427, 52 Atl. 1097. To the same effect, *Campbell v. Chicago, R. I. & P. R. Co.*, 45 Iowa, 76.

possibly afford.”^{§14} While the application of the principle has at times led to differing results, it is well settled and authoritatively established by the uniform current of authority in this country and in England,^{§15} except as it has been expressly modified by legislation.^{§16}

The injured party and he whose negligence caused the injury must have had a common master.^{§17} It will not be sufficient that their masters are engaged in a common undertaking,^{§18} or that one servant is in the employ of a principal and the other in that of an independent contractor,^{§19} though, as the right of a single control is the determinative test, they will be regarded as fellow servants where the principal has or exercises the power to direct the employés of his contractor.^{§20} So, where a servant has been loaned for a special purpose, in the fulfillment of which he acts under the control of the party to whom he is lent, he is deemed, while so acting, to be in the employ of the latter.^{§21}

^{§14} *Priestly v. Fowler*, 3 M. & W. 1, 7, per Abinger, C. B. And see *Farwell v. Boston & W. R. Corp.*, 4 Metc. (Mass.) 49, 38 Am. Dec. 339.

^{§15} *Sullivan v. Mississippi M. R. Co.*, 11 Iowa, 421; *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. 590, 29 L. Ed. 755; *Hutchinson v. York, N. & B. Ry. Co.*, 5 Exch. 343. And see cases hereafter cited.

^{§16} See *infra*, p. 194.

^{§17} A switch tender, employed by a railroad company upon a portion of its track over which it permits another company to run trains, is not the fellow servant of an engineer employed by the latter. *Smith v. New York & H. R. Co.*, 19 N. Y. 127, 75 Am. Dec. 305.

^{§18} *Philadelphia, W. & B. R. Co. v. State*, 58 Md. 372; *Morgan v. Smith*, 159 Mass. 570, 35 N. E. 101; *Jansen v. City of Jersey City*, 61 N. J. Law, 243, 39 Atl. 1025; *Sanford v. Standard Oil Co.*, 118 N. Y. 371, 24 N. E. 313, 16 Am. St. Rep. 787; *Johnson v. Lindsay* [1891] App. Cas. 371.

^{§19} *Ward v. New England Fibre Co.*, 154 Mass. 419, 28 N. E. 299; *Norman v. Middlesex & S. Traction Co.*, 71 N. J. Law, 562, 60 Atl. 936; *Coughtry v. Globe Woolen Co.*, 56 N. Y. 124, 15 Am. Rep. 387; *Coates v. Chapman*, 195 Pa. 109, 45 Atl. 676; *Otis Steel Co. v. Wingle*, 152 Fed. 914, 82 C. C. A. 62.

^{§20} *Johnson v. City of Boston*, 118 Mass. 114; *Ewan v. Lippincott*, 47 N. J. Law, 192, 54 Am. Rep. 148.

^{§21} *Hasty v. Sears*, 157 Mass. 123, 31 N. E. 759, 34 Am. St. Rep. 267.

Mere suggestion as to details or the necessary co-operation, where power to control is lacking, is not enough.³²²

Again, that there is a common master will not necessarily make the parties fellow servants, for there may be and usually is a difference in grade and in the character of the work performed by the injured and the negligent servants. "There is probably no subject connected with the law of negligence which has given rise to more variety of opinion than that of fellow service. The authorities are hopelessly divided. * * * It is useless to attempt an analysis of the cases, * * * since they are wholly irreconcilable in principle and too numerous to justify citation."³²³ Still the weight of authority is now strongly in favor of the view that mere difference in rank or labor will not prevent the

³²² *Coates v. Chapman*, 195 Pa. 109, 45 Atl. 676. "It sometimes happens that one wishes a certain work to be done for his benefit, and neither has persons in his employ who can do it nor is willing to take such persons into his general service. He may then enter into an agreement with another. If that other furnishes him with men to do the work, and places them under his exclusive control in the performance of it, those men become pro hac vice the servants of him to whom they are furnished. But, on the other hand, one may prefer to enter into an agreement with another that that other for a consideration shall himself perform the work through servants of his own selection, retaining the direction and control of them. In the first case, he to whom the workmen are furnished is responsible for their negligence in the conduct of the work, because the work is his work and they are for the time his workmen. In the second case, he who agrees to furnish the completed work through servants over whom he retains control is responsible for their negligence in the conduct of it, because, though it is done for the ultimate benefit of the other, it is still in its doing his own work. To determine whether a given case falls within the one class or the other, we must inquire whose is the work being performed, a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work. Here we must carefully distinguish between authoritative direction and control and mere suggestion as to details or the necessary co-operation where the work furnished is part of a larger undertaking." *Standard Oil Co. v. Anderson*, 212 U. S. 215, 221, 29 Sup. Ct. 252, 53 L. Ed. 480, per Moody, J.

³²³ *Northern Pac. R. Co. v. Hambly*, 154 U. S. 349, 355, 14 Sup. Ct. 983, 38 L. Ed. 1009, per Brown, J.

parties from being regarded as coservants. This is true both in England³²⁴ and generally in the United States.³²⁵

Eliminating, therefore, this question from consideration, we find, broadly speaking, a difference between the English and American courts, in that the former apply the test of common employment and the latter of vice principalship. Just what is meant by common employment it is difficult to say. Each case must practically rest upon its own facts. The language of Earle, C. J., in *Morgan v. Vale of Neath Ry. Co.*,³²⁶ would apparently indicate that it is a question of what risks may reasonably be considered as foreseeable by the servant. This test, therefore, fails to take into account whether the master may safely resign control into the hands of other employés without incurring the risk of a denial to the latter of the status of fellow servants of the injured party with respect to functions required for the protection of the employé. That this may be done was settled by *Wilson v. Merry*,³²⁷ which in effect held that the employé vested with control is not, because of his exercise of the function

³²⁴ "There are many cases where the immediate object on which the one servant is employed is very dissimilar from that on which the other is employed, and yet the risk of injury from the negligence of the one is as much a natural and necessary consequence of the employment which the other accepts that it must be included in the risks which are to be considered in his wages." *Morgan v. Vale of Neath Ry. Co.*, L. R. 1 Q. B. 149, 155, 5 B. & S. 736, 35 L. J. Q. B. 23, 13 L. T. Rep. N. S. 564, 14 Wkly. Rep. 144, 47 E. C. L. 736; *Lovell v. Howell*, L. R. 1 C. P. 161, 45 L. J. C. P. 387, 34 L. T. Rep. N. S. 183, 24 Wkly. Rep. 672.

³²⁵ For a review of the so-called "departmental doctrine," see *Labatt on Master and Servant*, § 500. "To hold the principal liable whenever there are gradations of rank between the person receiving and the person causing the injury, or whenever they are employed in different departments of the same general service, would result in frittering away the whole doctrine of fellow service." *Northern Pac. R. Co. v. Hambly*, 154 U. S. 349, 360, 14 Sup. Ct. 983, 38 L. Ed. 1009, per Brown, J.

³²⁶ *Supra*. Here a carpenter in the employ of a railroad, while at work upon a scaffold, was thrown to the ground through the negligence of some porters, likewise in the company's service, who shifted an engine so that it struck one of the scaffold's supports. The company was held not liable.

³²⁷ L. R. 1 H. L. Sc. App. Cas. 326, 19 L. T. N. S. 30.

so transferred, to be regarded as the representative of the master, for whose acts the employer must answer.³²⁸

Though the English view is not altogether without support in America, the great weight of authority is to the effect that liability depends on "whether the negligent servant, in the act or omission complained of, represented the master in the performance of any duty owed by the master to the servant injured."³²⁹ It has been seen that the master personally owes certain obligations to the servant. These he cannot delegate, and thereby escape responsibility. In their discharge the delegate becomes the alter ego or vice principal of the master, and for their breach the latter is liable.³³⁰ Thus a servant to whom has been intrusted the duty of selecting a safe place to work,³³¹ of supplying reasonably safe materials, tools, or appliances,³³² of giving proper inspection³³³ and instruction,³³⁴ and of selecting competent and dismissing incompetent cowork-

³²⁸ For a review of this case, and cases based thereon, see Labatt on Master and Servant, § 529.

³²⁹ *McLaine v. Head & Dowst Co.*, 71 N. H. 294, 295, 52 Atl. 545, 58 L. R. A. 462, 93 Am. St. Rep. 522, per Parsons, J. To the same effect, *Callan v. Bull*, 113 Cal. 593, 602, 45 Pac. 1017; *Beesley v. F. W. Wheeler & Co.*, 103 Mich. 196, 203, 61 N. W. 659, 27 L. R. A. 268; *Burns v. Delaware & A. Tel. & Tel. Co.*, 70 N. J. Law, 745, 754, 59 Atl. 220, 592, 67 L. R. A. 956; *Vogel v. American Bridge Co.*, 180 N. Y. 373, 378, 73 N. E. 1, 70 L. R. A. 725; *Baltimore & Ohio R. Co. v. Baugh*, 149 U. S. 368, 387, 13 Sup. Ct. 914, 37 L. Ed. 772.

³³⁰ *Crispin v. Babbitt*, 81 N. Y. 516, 37 Am. Rep. 521.

³³¹ *Sadowski v. Michigan Car Co.*, 84 Mich. 100, 47 N. W. 598; *Cook v. St. Paul, M. & M. Ry. Co.*, 34 Minn. 45, 24 N. W. 311; *Pantzar v. Tilly Foster Iron Min. Co.*, 99 N. Y. 368, 2 N. E. 24; *Madigan v. Oceanic Steam Navigation Co.*, 82 App. Div. 206, 81 N. Y. Supp. 705; *Cadden v. American Steel Barge Co.*, 88 Wis. 409, 60 N. W. 800.

³³² *Wilson v. Willimantic Linen Co.*, 50 Conn. 433, 47 Am. Rep. 653; *Ford v. Fitchburg R. Co.*, 110 Mass. 240, 14 Am. Rep. 598; *Hazzard v. State*, 108 App. Div. 119, 95 N. Y. Supp. 1103.

³³³ *Rincicotti v. John J. O'Brien Contracting Co.*, 77 Conn. 617, 60 Atl. 115, 69 L. R. A. 936; *Chicago & E. I. R. Co. v. Kneirim*, 152 Ill. 458, 39 N. E. 324, 43 Am. St. Rep. 259; *Koehler v. New York Steam Co.*, 183 N. Y. 1, 75 N. E. 538.

³³⁴ *Brennan v. Gordon*, 118 N. Y. 489, 23 N. E. 810, 8 L. R. A. 818, 16 Am. St. Rep. 775.

ers,³³⁵ is not the fellow servant of other employés while acting in the discharge of such functions. But this must be taken subject to the important limitation that where the general work includes the construction or preparation of the appliances with which they are to work, such as building a scaffold on which they are to stand, for which proper material has been supplied,³³⁶ they must be deemed fellow servants in respect to the negligence of one of them as to such construction or preparation.³³⁷

The doctrine of vice principalship will not, however, exclude the supplementary test of common employment.³³⁸ Illustrative cases will be found in the note.³³⁹ Recovery will not be refused where the master has been guilty of a

³³⁵ *Gilman v. Eastern R. Co.*, 13 Allen (Mass.) 433, 90 Am. Dec. 210.

³³⁶ *Arkerson v. Dennison*, 117 Mass. 407.

³³⁷ *Sims v. American Steel Barge Co.*, 56 Minn. 68, 57 N. W. 322, 45 Am. St. Rep. 451; *Peschel v. Chicago, M. & St. P. Ry. Co.*, 62 Wis. 338, 21 N. W. 269. And see *Filbert v. Delaware & H. Canal Co.*, 121 N. Y. 207, 23 N. E. 1104.

³³⁸ "If the departments of the two servants are so far separated from each other that the possibility of coming in contact, and hence of incurring danger from the negligent performance of the duties of such other department, could not be said to be within the contemplation of the person injured, the doctrine of fellow service should not apply." *Northern Pac. R. Co. v. Hambly*, 154 U. S. 349, 357, 14 Sup. Ct. 983, 38 L. Ed. 1009, per Brown, J.

³³⁹ The following have been held fellow servants: Employé of department store and elevator boy, *Spees v. Boggs*, 198 Pa. 112, 47 Atl. 875, 52 L. R. A. 933, 82 Am. St. Rep. 792; woodcutter and engineer of train used to haul lumber and transport employés, *Railey v. Garbutt*, 112 Ga. 288, 37 S. E. 360; stewardess and ship's carpenter, *Quebec S. S. Co. v. Merchant*, 133 U. S. 375, 10 Sup. Ct. 397, 33 L. Ed. 656; mate and seaman, *Benson v. Goodwin*, 147 Mass. 237, 17 N. E. 517; *Geoghegan v. Atlas Steamship Co.*, 6 Misc. Rep. 127, 25 N. Y. Supp. 1116; miner and engineer having charge of hoisting engine, *Trewatha v. Buchanan Gold Min. & Mill. Co.*, 96 Cal. 494, 28 Pac. 571, 31 Pac. 561; *McAndrews v. Burns*, 39 N. J. Law, 117; engineer and engine wiper, *Streets v. Grand Trunk R. Co.*, 76 App. Div. 480, 78 N. Y. Supp. 729, affirmed 178 N. Y. 553, 70 N. E. 1109; engineer of steam roller and flagman, *Hanna v. Granger*, 18 R. I. 507, 28 Atl. 659. No attempt has been made to state the conflicting conclusions in the case of railroad employés. See Jaggard on Torts, p. 1038, note.

breach of duty, though the negligence of a fellow servant contributed to the injury.³⁴⁰ Still it is, of course, required that some fault on the master's part be established. Hence he will not be liable if the coservant selects an improper tool or appliance where a proper one is at hand.³⁴¹

Statutory Regulations

In many states, legislation has considerably changed the common-law rules. The statutes present such marked differences that only a most general summary is possible within the compass of this work. Roughly speaking, they are either preventive or compensatory in tenor. By the former the duty of the employer is in many respects made more specific, as by requiring him to furnish proper light and space, to guard dangerous machinery, to make periodical inspections, and to erect fire escapes. These acts break in upon the doctrine of assumption of risk, since it has been held that, where they have been violated, the servant, though working with knowledge of the violation, does not as a matter of law assume the risk of the injury.³⁴²

In some states, under employers' liability acts, the fellow servant doctrine has been abrogated, while in others it has merely been modified, defined, and limited,³⁴³ "comparative negligence" has been established in place of the doctrine which prohibited a recovery where the negligence of the plaintiff contributed to the injury, and the burden of proving contributory negligence has been placed upon the

³⁴⁰ *Elmer v. Locke*, 135 Mass. 575; *Stringham v. Stewart*, 100 N. Y. 516, 3 N. E. 575; *Young v. New Jersey & N. Y. R. Co. (C. C.)* 46 Fed. 160, affirmed *New Jersey & N. Y. Ry. Co. v. Young*, 1 C. C. A. 428, 49 Fed. 723; *Grand Trunk Ry. Co. v. Cummings*, 106 U. S. 700, 1 Sup. Ct. 493, 27 L. Ed. 266.

³⁴¹ *Thyng v. Fitchburg R. Co.*, 156 Mass. 13, 30 N. E. 169, 32 Am. St. Rep. 425; *Hefferen v. Northern Pac. R. Co.*, 45 Minn. 471, 48 N. W. 1, 526.

³⁴² *Davis v. Mercer Lumber Co.*, 164 Ind. 413, 73 N. E. 899; *Fitzwater v. Warren*, 206 N. Y. 355, 99 N. E. 1042, 42 L. R. A. (N. S.) 1229; *Welch v. Waterbury Co.*, 206 N. Y. 522, 100 N. E. 426. Contra, *Marshall v. Norcross*, 191 Mass. 568, 77 N. E. 1151.

³⁴³ As in the case of "necessary risks," see *Felcin v. Society of New York Hospital*, 155 App. Div. 545, 140 N. Y. Supp. 772.

defendant, plaintiff being no longer required to establish its nonexistence.

"Workmen's compensation acts," as the name indicates, are designed to furnish relief practically irrespective of any culpability on the part of the employer or employé, unless the latter's negligence has been willful, though by some statutes his compensation is then merely reduced. A more or less elaborate schedule is provided, covering death and disability, and usually the rates are fixed by a percentage of wages for a fixed time. Sometimes resort is had to a fund created from premiums paid by the employer.³⁴⁴ These acts are indicative of the present tendency to remove the burden from the employé and place it upon the industry. Their advocates argue that the industry now bears the loss due to the deterioration and destruction of machinery, and that it should likewise add to the cost of production the loss due to the impairment or destruction of the employé.

³⁴⁴ See Bradbury's *Workmen's Compensation and State Insurance Law*; Boyd on *Workmen's Compensation*; also a partial collection of statutes in 2 *Harvard Law Review*, 212.

CHAPTER VI

GENERAL PRINCIPLES—PARTIES (CONTINUED)

- 49. The Wrongdoer (Continued)—Several Liability—Imputed Culpability.
- 50. The State.
- 51. Corporations.
- 52. Employers.
- 53. Servants and Agents.
- 54. Independent Contractors.
- 55. Partners.
- 56. Owners.
- 57. Joint and Several Liability—How Arising.
- 58. Results.

IMPUTED CULPABILITY

- 49. The preceding chapter treated of liability as arising from the personal acts or omissions of the wrongdoer. There will now be considered the responsibility for another's wrong.

THE STATE

- 50. The state cannot be sued, except with its own consent. No jurisdiction will be assumed over the sovereign, ambassador, or public property of another nation.

To allow a direct suit to be brought against the sovereign in his own courts without his consent is inconsistent with the very idea of supreme executive power.¹ But in many instances consent has been given. Thus by the United States Constitution² the federal Supreme Court is

¹ It would "endanger the performance of the public duties of the sovereign to subject him to repeated suits as a matter of right at the will of any citizen, and to submit to the judicial tribunals the control and disposition of his public property, his instruments and means of carrying on the government in war and peace, and the money in his treasury." *Briggs v. Light Boat Upper Cedar Point*, 11 Allen (Mass.) 157, 162, per Gray, J.

² Section 2, art. 3.

vested with original jurisdiction of "controversies between two or more states,"³ and the power to enforce his rights against the United States and some of the commonwealths by proceedings before courts or boards of claims has been given to the private individual. Whether a liability of the kind sought to be enforced comes within the wording of the act and the time and method of enforcement involves a question of construction,⁴ since the state can be sued only on its own terms.⁵ By some acts, claims sounding in tort have been excluded;⁶ by others, the state has consented to have its liability determined.⁷ Frequently statutes are enacted applicable only to particular claims.⁸

As a consequence of the absolute independence of the state, international comity induces each country to respect the dignity of others and to decline to exercise territorial jurisdiction over the person of a foreign sovereign,⁹ his ambassador or minister,¹⁰ or the public property of his nation.¹¹

³ *South Dakota v. North Carolina*, 192 U. S. 286, 24 Sup. Ct. 269, 48 L. Ed. 448. Inapplicable to suits by individuals (Amend. XI).

⁴ Thus the New York Court of Claims had no power to pass upon a claim the basis of which was that claimant's intestate, while upon a canal boat passing under a bridge, received injuries resulting in death, through the negligence of the state's agents or servants operating the bridge, where the statute which it was asserted conferred jurisdiction excluded "claims arising from damages resulting from the navigation of the canals." *Locke v. State*, 140 N. Y. 480, 35 N. E. 1076.

⁵ *Treasurer v. Wygall*, 46 Tex. 447, 458.

⁶ *Bigby v. U. S.*, 188 U. S. 400, 23 Sup. Ct. 468, 47 L. Ed. 519; *Schillinger v. U. S.*, 155 U. S. 163, 15 Sup. Ct. 85, 39 L. Ed. 108; *Hill v. U. S.*, 149 U. S. 593, 13 Sup. Ct. 1011, 37 L. Ed. 862; *Langford v. U. S.*, 101 U. S. 341, 25 L. Ed. 1010.

⁷ See Code Civ. Proc. N. Y. § 264; *Herkimer Lumber Co. v. State*, 73 Misc. Rep. 501, 131 N. Y. Supp. 22; *Litchfield v. Bond*, 105 App. Div. 229, 93 N. Y. Supp. 1016.

⁸ See *Bickerdike v. State*, 144 Cal. 681, 78 Pac. 270.

⁹ The Sultan of Johore, an independent sovereign, could not against his will be sued in an English court for breach of promise of marriage. *Mighell v. Johore*, [1894] 1 Q. B. 149, 58 J. P. 224, 63 L.

¹⁰ See note 10 on following page.

¹¹ See note 11 on following page.

CORPORATIONS

51. (A) **Municipal.** A municipal corporation is exempt from liability in the exercise of its governmental functions, but not for wrongs committed in its private character.
- (B) **Private and charitable.** A private corporation organized for charitable purposes is not liable where due care has been exercised in the selection of its employé, though some courts have held this principle inapplicable where the injured party was not a beneficiary of the charity.
- (C) **Private and noncharitable.** These stand on the same footing as an individual, and their liability depends on the rules applicable to employers.

(A) Municipal Corporations

The prevailing doctrine has been clearly stated by the New York Court of Appeals. To determine the liability of a municipal corporation, it should be kept in mind that

J. Q. B. 593, 70 L. T. Rep. N. S. 84, 9 Reports, 447. And see *De Haber v. Portugal*, 17 Q. B. 196, 16 Jur. 164, 20 L. J. Q. B. 488, 79 E. C. L. 196; *Brunswick v. Hanover*, 6 Beav. 1, 8 Jur. 253, 13 L. J. Ch. 107, 49 Eng. Rep. 724, affirmed 2 H. L. Cas. 1, 9 Eng. Repr. 993; *American Banana Co. v. United Fruit Co.*, 166 Fed. 261, 92 C. C. A. 325, affirmed 213 U. S. 347, 29 Sup. Ct. 511, 53 L. Ed. 826, 16 Ann. Cas. 1047.

¹⁰ *Holbrook v. Henderson*, 4 Sandf. (N. Y.) 619; Rev. St. U. S. 1878, §§ 4063-4065 (U. S. Comp. St. 1913, §§ 7611-7613). This immunity does not extend to consuls. *Wilcox v. Luco*, 118 Cal. 639, 45 Pac. 676, 50 Pac. 758, 45 L. R. A. 579, 62 Am. St. Rep. 305.

¹¹ Thus plaintiff's vessel, which had been seized under the authority of the Emperor of the French and converted into a man-of-war, was exempt from the jurisdiction of the United States courts. *The Exchange v. McFaddon*, 7 Cranch, 116, 3 L. Ed. 287. An unarmed mail packet belonging to a foreign sovereign, commanded by officers commissioned by him, is exempt from seizure. *The Parlement Belge*, 5 P. D. 197, 4 Aspin. 234, 42 L. T. Rep. N. S. 273, 28 Wkly. Rep. 642. An English court lacks jurisdiction to order the destruction of shells belonging to the Mikado of Japan on the ground that they infringed plaintiff's patent. *Vavasseur v. Krupp*, 9 Ch. D. 351, 39 L. T. Rep. N. S. 437, 27 Wkly. Rep. 176.

it may possess "two kinds of powers—one governmental and public, and to the extent they are held and exercised is clothed with sovereignty; the other private, and to the extent they are held and exercised is a legal individual. The former are given and used for public purposes; the latter, for private purposes. While in the exercise of the former, the corporation is a municipal government, and while in the exercise of the latter is a corporate, legal individual."¹² Though the difference between the governmental and private function is clear, it is oftentimes difficult to fix where the line should be drawn. "All that can be done, probably, with safety, is to determine as each case arises under which class it falls."¹³

In any event, it must be evident that liability cannot arise out of the failure to perform a legislative, judicial, or discretionary duty, or by reason of the way in which official discretion has been exercised with respect thereto.¹⁴ This finds perhaps its best illustration in the case of streets and sewers. Whether they shall be laid out and constructed, of what size, and at what grade are questions of a judicial

¹² Lloyd v. City of New York, 5 N. Y. 369, 374, 55 Am. Dec. 347, per Foot, J. "A town acts in the dual capacities of an *imperium* in *imperio*, exercising governmental duties, and of a private corporation, enjoying powers and privileges conferred for its own benefit. When such municipal corporations are acting within the purview of their authority, in their ministerial or corporate character, in the management of property for their own benefit, or in the exercise of powers assumed voluntarily for their own advantage, they are impliedly liable for damage caused by the negligence of officers or agents subject to their control, although they may be engaged in some work that will inure to the general benefit of the municipality. * * * On the other hand, where a city or town is exercising the judicial, discretionary, or legislative authority conferred by its charter, or is discharging a duty imposed solely for the benefit of the public, it incurs no liability for the negligence of its officers, though acting under color of office, unless some statute expressly or by necessary implication subjects the corporation to pecuniary responsibility for such negligence." Moffitt v. Asheville, 103 N. C. 237, 254, 9 S. E. 695, 697, 14 Am. St. Rep. 810, per Avery, J.

¹³ Lloyd v. City of New York, *supra*.

¹⁴ City of Anderson v. East, 117 Ind. 126, 19 N. E. 726, 2 L. R. A. 712, 10 Am. St. Rep. 35.

character, and it is generally held that the municipality cannot be called to account for the result.¹⁵ But the actual work of construction and repair is ministerial, and negligence will entail liability.¹⁶ A city is not liable for failing to pass¹⁷ or enforce an ordinance,¹⁸ or to abate a nuisance on the premises of a third party.¹⁹ Among the governmental functions are likewise necessarily included the protection of the public safety²⁰ and health,²¹ the furnishing

¹⁵ As to streets, see *Hoyt v. Danbury*, 69 Conn. 341, 37 Atl. 1051; *City Council v. Little*, 115 Ga. 124, 41 S. E. 238; *Shippy v. Village of Au Sable*, 65 Mich. 494, 32 N. W. 741; *Urquhart v. Ogdensburg*, 91 N. Y. 67, 43 Am. Rep. 91, note. As to sewers and drains, see *Wicks v. Town of De Witt*, 54 Iowa, 130, 6 N. W. 176; *Child v. City of Boston*, 4 Allen (Mass.) 41, 81 Am. Dec. 680; *Harrington v. Township of Woodbridge*, 70 N. J. Law, 28, 56 Atl. 141; *Mills v. City of Brooklyn*, 32 N. Y. 489; *Johnston v. District of Columbia*, 118 U. S. 19, 6 Sup. Ct. 923, 30 L. Ed. 75.

¹⁶ As to streets, see *Village of Jefferson v. Chapman*, 127 Ill. 438, 20 N. E. 33, 11 Am. St. Rep. 136; *Evans v. Iowa City*, 125 Iowa, 202, 100 N. W. 1112; *Haniford v. City of Kansas*, 103 Mo. 172, 15 S. W. 753; *Hines v. City of Lockport*, 50 N. Y. 236. As to sewers and drains, see *Langley v. City Council of Augusta*, 118 Ga. 590, 45 S. E. 486, 98 Am. St. Rep. 133; *Merrifield v. City of Worcester*, 110 Mass. 216, 14 Am. Rep. 592; *Barton v. City of Syracuse*, 36 N. Y. 54, 1 Tr. App. 317; *Allentown v. Kramer*, 73 Pa. 406.

¹⁷ *Howard v. City of Brooklyn*, 30 App. Div. 217, 51 N. Y. Supp. 1058 (riding bicycle on sidewalk); *Jones v. City of Williamsburg*, 97 Va. 722, 34 S. E. 883, 47 L. R. A. 294.

¹⁸ *Levy v. City of New York*, 1 Sandf. (N. Y.) 465 (swine running at large); *Hines v. City of Charlotte*, 72 Mich. 278, 40 N. W. 333, 1 L. R. A. 844 (establishing fire limits); *City of Lafayette v. Timberlake*, 88 Ind. 330 (coasting in streets); *Pierce v. City of New Bedford*, 129 Mass. 534, 37 Am. Rep. 387 (same); *Schultz v. City of Milwaukee*, 49 Wis. 254, 5 N. W. 342, 35 Am. Rep. 779 (same). Contra, *Taylor v. Mayor, etc., of City of Cumberland*, 64 Md. 68, 20 Atl. 1027, 54 Am. Rep. 759.

¹⁹ *City of Anderson v. East*, 117 Ind. 126, 19 N. E. 726, 2 L. R. A. 712, 10 Am. St. Rep. 35; *City of Chattanooga v. Reid*, 103 Tenn. 616, 53 S. W. 937.

²⁰ *Craig v. City of Charleston*, 180 Ill. 154, 54 N. E. 184 (assault by police officer); *Calwell v. City of Boone*, 51 Iowa, 687, 2 N. W. 614, 33 Am. Rep. 154 (Id.); *EDDY v. VILLAGE OF ELLICOTTVILLE*, 35 App. Div. 256, 54 N. Y. Supp. 800, Chapin Cas. Torts, 91 (pneumonia contracted after confinement in unheated jail); *Western College of Homeopathic Medicine v. City of Cleveland*, 12 Ohio St. 375

²¹ See note 21 on following page.

of education,²² and the care of dependent and defective classes.²³

On the other hand, if a municipality operate a ferry for hire,²⁴ tow vessels,²⁵ supply gas²⁶ or water,²⁷ or maintain wharves or docks,²⁸ it acts in its proprietary or private

(failure to suppress a mob). Contra, by statute, *Darlington v. Mayor, etc., of City of New York*, 31 N. Y. 164, 88 Am. Dec. 248. This also covers injuries from negligence of the members of fire departments. *Fisher v. City of Boston*, 104 Mass. 87, 6 Am. Rep. 196; *Edgerly v. Concord*, 62 N. H. 8, 13 Am. Rep. 533; *Smith v. City of Rochester*, 76 N. Y. 506.

²¹ *Ogg v. City of Lansing*, 35 Iowa, 495, 14 Am. Rep. 499; *Brown v. Inhabitants of Vinalhaven*, 65 Me. 402, 20 Am. Rep. 709; removal of ashes, rubbish, and garbage, *Love v. City of Atlanta*, 95 Ga. 129, 22 S. E. 29, 51 Am. St. Rep. 64; *McFadden v. Jewell*, 119 Iowa, 321, 93 N. W. 302, 60 L. R. A. 401, 97 Am. St. Rep. 321; *Condict v. Mayor, etc., of Jersey City*, 46 N. J. Law, 157. Contra, *Quill v. City of New York*, 36 App. Div. 476, 55 N. Y. Supp. 889; sprinkling streets, *Conelly v. City of Nashville*, 100 Tenn. 262, 46 S. W. 565.

²² *Hill v. City of Boston*, 122 Mass. 344, 23 Am. Rep. 332 (defective stairway in schoolhouse); *Ham v. Mayor, etc., of City of New York*, 70 N. Y. 459 (discharge of foul water from schoolhouse); *Wixon v. City of Newport*, 13 R. I. 454, 43 Am. Rep. 35 (defective heating apparatus in schoolhouse).

²³ *Summers v. Daviess County*, 103 Ind. 262, 2 N. E. 725, 53 Am. Rep. 512 (selection of physician to attend poor); *Lefrois v. Monroe County*, 162 N. Y. 563, 57 N. E. 185, 50 L. R. A. 206 (sewage from penitentiary and almshouse); *Hughes v. Monroe County*, 147 N. Y. 49, 41 N. E. 407, 39 L. R. A. 33 (employé of insane asylum injured while operating mangle); *Maxmillian v. Mayor, etc., of City of New York*, 62 N. Y. 160, 20 Am. Rep. 468 (ambulance negligently driven).

²⁴ *Townsend v. Boston*, 187 Mass. 283, 72 N. E. 991.

²⁵ *City of Philadelphia v. Gavagnin*, 62 Fed. 617, 10 C. C. A. 552.

²⁶ *Western Saving Fund Society v. City of Philadelphia*, 31 Pa. 175, 72 Am. Dec. 730.

²⁷ *Stock v. City of Boston*, 149 Mass. 410, 21 N. E. 871, 14 Am. St. Rep. 430; *City of Philadelphia v. Gilmartin*, 71 Pa. 140. But see *Springfield Fire & Marine Ins. Co. v. Village of Keeseville*, 148 N. Y. 46, 42 N. E. 405, 30 L. R. A. 660, 51 Am. St. Rep. 667; *Town of Southeast v. New York*, 96 App. Div. 598, 89 N. Y. Supp. 630. It does not alter the case that a portion of the water is used for protection against fire and in promoting the public health. *Hourigan v. Norwich*, 77 Conn. 358, 59 Atl. 487.

²⁸ *City of Pittsburgh v. Grier*, 22 Pa. 54, 60 Am. Dec. 65; *Mayor, etc., of City of Memphis v. Kimbrough*, 12 Heisk. (Tenn.) 133. And

character. The power so to do has been conferred upon it, not from considerations connected with the government of the state at large, but for the private advantage of the corporation as a distinct legal personality. As to such power and as to the property acquired thereunder it is to be regarded *quoad hoc* a private corporation.²⁹ Thus liability may or may not exist with respect to the same building, dependent upon the uses to which it has been put. For instance, a city will not be responsible for damage caused by snow and ice negligently thrown by its employés upon plaintiff's property while engaged in cleaning the roof of a building used exclusively for municipal purposes;³⁰ but it will be liable for injuries due to a failure to light sufficiently the stairway leading to a room in the city hall, which had been let for a public entertainment.³¹

For mere failure to pass or enforce an ordinance, it has been seen that the municipality will not be liable; nor is it liable for omitting to abate a nuisance upon the property of another. A different question is presented where the wrongful act has been expressly licensed or permitted, as in the case of the discharge of fireworks in a congested locality. Though the authorities are in conflict,³² it would seem fair to place the loss arising from this species of nuisance upon all who are responsible for it.³³

see *Kennedy v. Mayor, etc., of City of New York*, 73 N. Y. 365, 20 Am. Rep. 169.

²⁹ See *Safety Insulated Wire & Cable Co. v. City of Baltimore*, 66 Fed. 140, 13 C. C. A. 375.

³⁰ *Kelley v. Boston*, 186 Mass. 165, 71 N. E. 299, 6 L. R. A. 429. To same effect, *Snider v. City of St. Paul*, 51 Minn. 466, 53 N. W. 763, 18 L. R. A. 151.

³¹ *Little v. City of Holyoke*, 177 Mass. 114, 58 N. E. 170, 52 L. R. A. 417. To the same effect, *Worden v. City of New Bedford*, 131 Mass. 23, 41 Am. Rep. 185.

³² That the city is not responsible. *Kerr v. Inhabitants of Brookline*, 208 Mass. 190, 94 N. E. 257, 34 L. R. A. (N. S.) 464; *Hill v. Board of Aldermen of City of Charlotte*, 72 N. C. 55, 21 Am. Rep. 451; *Bartlett v. Town of Clarksburg*, 45 W. Va. 393, 31 S. E. 918, 43 L. R. A. 295, 72 Am. St. Rep. 817.

³³ *Landau v. New York*, 180 N. Y. 48, 72 N. E. 631, 105 Am. St. Rep. 709; *Speir v. City of Brooklyn*, 139 N. Y. 6, 34 N. E. 727, 21 L. R. A. 641, 36 Am. St. Rep. 664. Cf. *Cohen v. Mayor, etc., of New*

A distinction has been drawn between true municipal corporations, such as cities and incorporated villages, and what are termed quasi municipal corporations, created, without the immediate consent of the inhabitants, to aid the state in the administration of government. In this class are counties, townships, and school and road districts; also there is the New England town, whose general affairs are administered by the citizens in person at stated meetings and through officers elected by themselves.⁸⁴ These quasi municipal corporations are subject to a less onerous responsibility, in that it has been held in many cases that there should exist an express statute giving a cause of action.⁸⁵ This has not, however, passed unchallenged. "We find it not only difficult," said the Supreme Court of South Carolina,⁸⁶ "to perceive any good reason why a person, who sustains an injury by reason of a defect in a highway just beyond the corporate limits of a city or town, has no right of action against the public authorities charged with the duty of keeping such highway in repair, while such person would have a right of action if the injury he sustained had been received within the corporate limits of such city or town."

York, 113 N. Y. 532, 21 N. E. 700, 4 L. R. A. 406, 10 Am. St. Rep. 506; *Little v. City of Madison*, 42 Wis. 643, 24 Am. Rep. 435.

⁸⁴ See Dillon on Municipal Corporations, §§ 37-42.

⁸⁵ See Dillon on Municipal Corporations, §§ 1638-1646. For example, see the following: Counties, *Barnett v. Contra Costa Co.*, 67 Cal. 77, 7 Pac. 177; *White v. Bond County*, 58 Ill. 297, 11 Am. Rep. 65; *Kincaid v. Hardin Co.*, 53 Iowa, 430, 5 N. W. 589, 36 Am. Rep. 236; *Pundman v. St. Charles County*, 110 Mo. 594, 19 S. W. 733; townships, *Highway Com'rs of Niles Tp. v. Martin*, 4 Mich. 557, 69 Am. Dec. 333; school districts, *Bank v. Brainerd School District*, 49 Minn. 106, 51 N. W. 814; *Finch v. Board of Education of City of Toledo*, 30 Ohio St. 37, 27 Am. Rep. 414; towns, *Chidsey v. Town of Canton*, 17 Conn. 475; *Reed v. Inhabitants of Belfast*, 20 Me. 246; *Mower v. Inhabitants of Leicester*, 9 Mass. 247, 6 Am. Dec. 63; *Eastman v. Meredith*, 36 N. H. 284, 72 Am. Dec. 302.

⁸⁶ *Young v. City Council of Charleston*, 20 S. C. 116, 119, 47 Am. Rep. 827.

(B) Charitable Corporations

To hold a corporation organized and conducted as a public charity liable for the wrongdoing of its servants would be to work a diversion of the trust fund from the purpose for which the donor gave it. This would be against all law and equity, and would be carrying the doctrine of *respondeat superior* to an unreasonable and dangerous length, making it possible to sweep away all public charities. Public policy, therefore, decrees that no liability shall attach to such a corporation,⁸⁷ provided, it has been said, that due care has been exercised in the selection of the offending employé.⁸⁸ But it is submitted that any such limitation would destroy the principle itself. "For it can make no difference, so far as the integrity of the fund is concerned, whether it be sought after by one who is injured by the negligence of a servant or the negligent selection of such servant."⁸⁹ While the cases have perhaps chiefly been decided with reference to hospitals, yet, as will be noted from the foregoing citations, the doctrine is equally applicable to such public institutions as universities, reform schools, and fire insurance patrols maintained to save life and property,

⁸⁷ *Parks v. Northwestern University*, 218 Ill. 381, 75 N. E. 991, 2 L. R. A. (N. S.) 556, 4 Ann. Cas. 103; *Jensen v. Maine Eye & Ear Infirmary*, 107 Me. 408, 78 Atl. 898, 33 L. R. A. (N. S.) 141; *Perry v. House of Refuge*, 63 Md. 20, 52 Am. Rep. 495; *DOWNES v. HARPER HOSPITAL*, 101 Mich. 555, 60 N. W. 42, 25 L. R. A. 602, 45 Am. St. Rep. 427, Chapin Cas. Torts, 95; *Fire Ins. Patrol v. Boyd*, 120 Pa. 624, 15 Atl. 553, 1 L. R. A. 417, 6 Am. St. Rep. 745; *Abston v. Waldon Academy*, 118 Tenn. 24, 102 S. W. 351, 11 L. R. A. (N. S.) 1179.

⁸⁸ *Hearns v. Waterbury Hospital*, 66 Conn. 98, 33 Atl. 595, 31 L. R. A. 224; *McDonald v. Massachusetts General Hospital*, 120 Mass. 432, 21 Am. Rep. 529; *Corbett v. St. Vincent's Industrial School of Utica*, 79 App. Div. 334, 79 N. Y. Supp. 369, affirmed 177 N. Y. 16, 68 N. E. 997; *Powers v. Massachusetts Homeopathic Hospital*, 109 Fed. 294, 47 C. C. A. 122, 65 L. R. A. 372. The Supreme Court of Rhode Island has denied any immunity to charitable corporations as such. *Glavin v. Rhode Island Hospital*, 12 R. I. 411, 34 Am. Rep. 675. But hospitals sustained in whole or in part by charitable contributions are now made exempt by statute. Gen. Laws 1909, c. 213, § 38.

⁸⁹ *Adams v. University Hospital*, 122 Mo. App. 675, 686, 99 S. W. 453, 456, per Ellison, J.

though as to the last named the courts are not in accord.⁴⁰ A different result will not be reached because the hospital accepts payment from patients able to afford it,⁴¹ or the university requires its students to pay tuition fees,⁴² or the industrial school receives county aid and a small sum from the sale of its surplus products,⁴³ since it is the character of the institution itself which controls, which is not affected by such incidental additions to its revenues from the trust fund.

The selfish motives of the donor will not alter the situation. The true test, as has been seen, is whether the purpose of the enterprise is charitable, in that it is not to acquire gain. A hospital or medical department maintained by a railroad company,⁴⁴ or supported by the contributions of the employer and its employes,⁴⁵ is none the less charitable because the company might have thought that its operation would protect it from excessive claims for damages;⁴⁶ nor will a steamship company, which exercised due

⁴⁰ Contra: *Newcomb v. Boston Protective Department*, 151 Mass. 215, 24 N. E. 39, 6 L. R. A. 778; *Coleman v. Fire Ins. Patrol of New Orleans*, 122 La. 626, 48 South. 130, 21 L. R. A. (N. S.) 810, 16 Ann. Cas. 1217.

⁴¹ *Jensen v. Maine Eye & Ear Infirmary*, 107 Me. 408, 78 Atl. 898, 33 L. R. A. (N. S.) 141; *McDonald v. Massachusetts General Hospital*, 120 Mass. 432, 21 Am. Rep. 529; *DOWNES v. HARPER HOSPITAL*, 101 Mich. 555, 60 N. W. 42, 25 L. R. A. 602, 45 Am. St. Rep. 427, *Chapin Cas. Torts*, 95; *Taylor v. Protestant Hospital Ass'n*, 85 Ohio St. 90, 96 N. E. 1089, 39 L. R. A. (N. S.) 427; *Gable v. Sisters of St. Francis*, 227 Pa. 254, 75 Atl. 1087, 136 Am. St. Rep. 879. But where the hospital has undertaken to supply a competent nurse for whose services the plaintiff has agreed to pay, an action may be maintained for breach of the contract. *Ward v. St. Vincent's Hospital*, 39 App. Div. 624, 57 N. Y. Supp. 784.

⁴² *Parks v. Northwestern University*, 218 Ill. 381, 75 N. E. 991, 2 L. R. A. (N. S.) 556, 4 Ann. Cas. 103.

⁴³ *Corbett v. St. Vincent's Industrial School*, 79 App. Div. 334, 79 N. Y. Supp. 369, affirmed 177 N. Y. 16, 68 N. E. 997.

⁴⁴ *Elghmy v. Union Pac. Ry. Co.*, 93 Iowa, 538, 61 N. W. 1056, 27 L. R. A. 296.

⁴⁵ *Barden v. Atlantic Coast Line Ry. Co.*, 152 N. C. 318, 67 S. E. 971, 49 L. R. A. (N. S.) 801; *Richardson v. Carbon Hill Coal Co.*, 10 Wash. 648, 39 Pac. 95.

⁴⁶ *Union Pac. Ry. Co. v. Artist*, 60 Fed. 365, 9 C. C. A. 14, 23 L. R. A. 581. And see *Fire Ins. Patrol v. Boyd*, 120 Pa. 624, 15 Atl. 553, 1 L. R. A. 417, 6 Am. St. Rep. 745.

care in the selection of a ship's surgeon, be held accountable for the latter's negligence.⁴⁷

It has been asserted, however, that the true basis of the general doctrine of nonliability is not to be found in the necessity of preserving a trust fund intact, but rather in an acquiescence therein by all persons who accept the benefits,⁴⁸ thus spelling out a waiver by such persons of any responsibility of the institution for the torts of its servants, though this reasoning has not gone unquestioned.⁴⁹ It has therefore been held, that, as no such acquiescence can be attributed to an outsider, a recovery may be allowed in his favor.⁵⁰

The application of the general doctrine to a corporation akin to, but not among, those already enumerated, may be a matter of some difficulty, since, though there may be no division of profits, it may not be purely charitable. A corporation organized partly for social purposes,⁵¹ and a cemetery association,⁵² have been held to be not within the exempted class.

⁴⁷ *Laubhelm v. De Koninglyke N. S. Co.*, 107 N. Y. 228, 13 N. E. 781, 1 Am. St. Rep. 815. And see *O'Brien v. Cunard Steamship Company*, 154 Mass. 272, 28 N. E. 266, 13 L. R. A. 329; *Allan v. State Steamship Co.*, 132 N. Y. 91, 30 N. E. 482, 15 L. R. A. 166, 28 Am. St. Rep. 556.

⁴⁸ *Powers v. Massachusetts Homeopathic Hospital*, 109 Fed. 294, 47 C. C. A. 122, 65 L. R. A. 372.

⁴⁹ *Kellogg v. Church Charity Foundation*, 128 App. Div. 214, 218, 112 N. Y. Supp. 566. Cf. *Schloendorff v. Society of the N. Y. Hospital*, 211 N. Y. 125, 105 N. E. 92, 52 L. R. A. (N. S.) 505, Ann. Cas. 1915C, 581.

⁵⁰ *Hordern v. Salvation Army*, 199 N. Y. 233, 92 N. E. 626, 32 L. R. A. (N. S.) 62, 139 Am. St. Rep. 889 (plaintiff injured while making repairs; court refused to express any view as to the status of persons visiting charity patients); *Kellogg v. Church Charity Foundation of Long Island*, 203 N. Y. 191, 96 N. E. 406, 38 L. R. A. (N. S.) 481, Ann. Cas. 1913A, 883 (pedestrian injured by negligent driving of ambulance; judgment for plaintiff reversed on other grounds); *Bruce v. Central M. E. Church*, 147 Mich. 230, 110 N. W. 951, 10 L. R. A. (N. S.) 74, 11 Ann. Cas. 150.

⁵¹ *Chapin v. Holyoke Y. M. C. A.*, 165 Mass. 280, 42 N. E. 1130.

⁵² *Donnelly v. Boston Catholic Cemetery Ass'n*, 146 Mass. 163, 15 N. E. 505.

(C) Private and Noncharitable

It was supposed at one time that an action for a tort would not lie against corporations, at least in cases such as malicious prosecution, where wrongful motive was involved.⁵³ This doctrine is thoroughly exploded. The same rule now applies to them as to individuals.⁵⁴ "The interests of the community and the policy of the law demand that corporations should be divested of every feature of a fictitious character which shall exempt them from the ordinary liabilities of natural persons for acts and injuries committed by them and for them. Their immunities for wrongs are no greater than can be claimed by others."⁵⁵ Nor will the corporation escape merely because the act complained of was ultra vires. It will be liable, "however foreign to its nature or beyond its granted powers the wrongful transac-

⁵³ *Owsley v. Montgomery & W. P. R. Co.*, 37 Ala. 560. And see *Childs v. Bank of Missouri*, 17 Mo. 213.

⁵⁴ *Baltimore & Potomac R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 330, 2 Sup. Ct. 719, 27 L. Ed. 739.

⁵⁵ *Goodspeed v. East Haddam Bank*, 22 Conn. 530, 543, 58 Am. Dec. 439, per Church, C. J. See the following, where the corporation was held responsible: Assault and battery, *Moore v. Fitchburg R. Corp.*, 70 Mass. (4 Gray) 465, 64 Am. Dec. 83; *Denver & Rio Grande Ry. v. Harris*, 122 U. S. 597, 7 Sup. Ct. 1286, 30 L. Ed. 1146; conspiracy, *Buffalo Lubricating Oil Co. v. Standard Oil Co.*, 106 N. Y. 669, 12 N. E. 826; false imprisonment, *Lynch v. Metropolitan El. R. Co.*, 90 N. Y. 77, 43 Am. Rep. 141; fraud, *Scofield Rolling Mill Co. v. State*, 54 Ga. 635; *Cragle v. Hadley*, 99 N. Y. 131, 19 N. E. 537, 52 Am. Rep. 9; *Erie City Iron Works v. Barber & Co.*, 106 Pa. 125, 31 Am. Rep. 508; libel, *Maynard v. Fireman's Fund Ins. Co.*, 34 Cal. 48, 91 Am. Dec. 672; *Id.*, 47 Cal. 207; *Fogg v. Boston & Lowell R. Corp.*, 148 Mass. 513, 20 N. E. 109, 12 Am. St. Rep. 583; malicious prosecution, *Boogher v. Life Ass'n of America*, 75 Mo. 319, 42 Am. Rep. 413; negligence, *Consolidated Ice Machine Co. v. Kelfer*, 134 Ill. 481, 25 N. E. 799, 10 L. R. A. 696, 23 Am. St. Rep. 688; *Hickey v. Merchants' & Miners' Transp. Co.*, 152 Mass. 39, 24 N. E. 860; nuisance, *Schenectady First Baptist Church v. Schenectady & T. R. Co.*, 5 Barb. (N. Y.) 79; trespass, *Merrills v. Tariff Mfg. Co.*, 10 Conn. 384, 27 Am. Dec. 682. As to slander authorities are conflicting, but there seems no good reason for doubting liability. *Roemer v. Jacob Schmidt Brewing Co.* (Minn. 1916) 157 N. W. 640; *Kharas v. Collier, Inc.*, 171 App. Div. 388, 157 N. Y. Supp. 410.

tion or act may be.”⁵⁶ It would be a strange condition of the law which would permit the company to shield itself from liability by resort to a literal construction of charter powers which it had itself extended.⁵⁷ Thus, where an educational corporation was sued for injuries sustained through the negligence of its ferryman, it was no defense that the maintenance of the ferry was ultra vires;⁵⁸ and the same is true where a bank, without charter authority, but with the knowledge of the directors, takes special deposits, which are lost through gross negligence.⁵⁹ Further illustrations are given in the note.⁶⁰ As corporations can necessarily act only through their agents and servants, further consideration of their responsibility must be taken up when the liability of the employer is discussed.⁶¹

EMPLOYERS

52. The liability of employers will be considered as follows:

(A) For the wrong of a servant or agent.

(B) For the wrong of an independent contractor.

⁵⁶ *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30, 49, per Davis, J.

⁵⁷ See *Noyes v. Rutland & B. R. Co.*, 27 Vt. 110, 113.

⁵⁸ *Nims v. Mt. Hermon Boys' School*, 160 Mass. 177, 35 N. E. 776, 22 L. R. A. 364, 39 Am. St. Rep. 467.

⁵⁹ *First Nat. Bank v. Graham*, 100 U. S. 699, 25 L. Ed. 750. Though in fact the receipt of special deposits was here found not ultra vires.

⁶⁰ *Central Railroad & Banking Co. v. Smith*, 76 Ala. 572, 52 Am. Rep. 353; *German Nat. Bank v. Meadowcroft*, 95 Ill. 124, 35 Am. Rep. 137; *Alexander v. Relfe*, 74 Mo. 495; *New York, L. E. & W. R. Co. v. Haring*, 47 N. J. Law, 137, 54 Am. Rep. 123; *Hannon v. Siegel-Cooper Co.*, 167 N. Y. 244, 60 N. E. 597, 52 L. R. A. 429; *Burke v. State*, 64 Misc. Rep. 558, 119 N. Y. Supp. 1089; *Zinc Carbonate Co. v. First Nat. Bank*, 103 Wis. 125, 79 N. W. 229, 74 Am. St. Rep. 845.

⁶¹ See “Employers.”

FOR THE WRONG OF A SERVANT OR AGENT

53. Omitting any question of participation or ratification, the master or principal will be responsible—

- (1) Where the servant or agent, in committing the wrong, acted within the course of his employment with a view to the master's business; and—
- (2) Where the act or neglect constituted a violation of a duty resting upon the employer.

A master or principal will be responsible for the wrongful acts of the servant or agent in which he participated or which he subsequently ratified. But this does not depend upon rules peculiarly applicable to these relationships, and hence will be discussed when the liability of joint wrongdoers is considered. At present we are concerned only with the responsibility of the employer as such towards third persons who have been injured by the employé in cases where participation or ratification is lacking. Viewed from this standpoint, the employer will be responsible (1) where the employé has acted within the course of his employment; (2) where the act or neglect of the employé was a violation of duty resting upon the employer.

(1) Acts Within Course of Employment

It is difficult to explain the basis for the rule, except upon grounds of public utility. A master is answerable because it is on the whole better that he should suffer from defaults in the conduct of his business than that innocent third persons should bear the losses that such defaults cast upon them.⁶²

It is, of course, essential that the relation of master and servant or principal and agent exist, in order that the doctrine of *respondeat superior* apply. It has already been intimated that no such result follows where there is a lack of control over the delinquent individual, for which reason, as will be seen later, the principal will not generally be re-

⁶² See Hufcut on Agency, 194; Pollock on Torts, 72-74.

garded as liable for the acts or neglect of a contractor.⁶³ This presupposes, also, a freedom of selection; and hence, if one is compelled to accept the services of another, it would be unfair to place it in the latter's power to bring about a situation which would result to the former's disadvantage. This is illustrated where by statute the shipowner is obliged to receive a licensed pilot, who is negligent in the discharge of his official duty,⁶⁴ and a mine operator is required to employ a licensed foreman.⁶⁵

Assuming, however, that the relation exists, the principle to be applied, as stated by the New York Court of Appeals, is that "for the acts of the servant within the general scope of his employment, while engaged in the master's business and done with a view to the furtherance of that business and the master's interest, the master will be responsible, whether the act be done negligently, wantonly, or even willfully."⁶⁶ It will be observed that the phrase "scope of employment" is here used, though "course of employment" is to be preferred,⁶⁷ since it matters not that the servant in fact exceeded the powers conferred upon him, or did an act which the master was not authorized to do, so long as he acted in the line of his duty, or, being engaged in the service of the master, attempted to perform a duty pertaining, or which he believed to pertain, to that service.⁶⁸

⁶³ See *infra*, p. 214 et seq.

⁶⁴ *Homer Ramsdell Transp. Co. v. La Compagnie Générale Transatlantique*, 182 U. S. 406, 21 Sup. Ct. 831, 45 L. Ed. 1155; *General Steam Nav. Co. v. British & Colonial Steam Nav. Co.*, L. R. 3 Exch. 330. But the contrary has been held by the United States Supreme Court in admiralty on the principle of maritime law that the vessel, in whosoever hands she may be, is herself considered as the wrongdoer. *The China*, 7 Wall. 53, 19 L. Ed. 67; *Ralli v. Troop*, 157 U. S. 386, 402, 15 Sup. Ct. 657, 39 L. Ed. 742.

⁶⁵ *Durkin v. Kingston Coal Co.*, 171 Pa. 193, 33 Atl. 237, 29 L. R. A. 808, 50 Am. St. Rep. 801, holding unconstitutional a statute making the operator liable for the foreman's negligence.

⁶⁶ *Mott v. Consumers' Ice Co.*, 73 N. Y. 543, 547, per Allen, J.

⁶⁷ See *Mallach v. Ridley*, 24 Abb. N. C. 183, note, 47 Hun, 638, 9 N. Y. Supp. 922.

⁶⁸ *Lynch v. Metropolitan El. R. Co.*, 90 N. Y. 77, 43 Am. Rep. 141. An extended discussion will be found in note to *Ritchie v. Waller*, 27 L. R. A. 161.

Necessarily the doctrine cannot be stated with any great degree of definiteness, and each case must be determined with reference to the particular circumstances. The decisions in *Palmeri v. Manhattan R. Co.*⁶⁹ and *Mulligan v. New York & R. B. R. Co.*⁷⁰ well illustrate what is meant by "course of employment" and "view to master's interest." In the first, the company was held liable for the act of its ticket agent, who followed a passenger to the platform and, upon her refusal to give him other money in place of that already paid, falsely charged her with passing counterfeit coin, called her a prostitute, and detained her while attempting to procure an officer. In the second, the ticket agent, after receiving from plaintiff a five dollar bill and giving him change, caused his arrest, believing him to be one of three individuals described as counterfeiters in a circular previously left with the agent by a detective not in defendant's employ. For this the company was not liable. In the first case, what the agent did was in the endeavor to protect and recover his employer's property. In the second, he acted as a good citizen desiring to assist the police. As an agent he should have refused to accept what he believed to be a counterfeit bill. In taking it, he went beyond the line of his duty, for his object was to entrap the supposed criminal.

At times, the doctrine becomes very difficult to apply. Where a servant exclusively for his own private purposes uses the master's vehicle, clearly the master is not liable to one injured by the servant's negligence.⁷¹ But suppose, while driving on an errand of the master, he goes out of his way on an errand of his own? Seemingly this must depend upon the extent of the deviation.⁷²

⁶⁹ *PALMERI v. MANHATTAN R. CO.*, 133 N. Y. 261, 30 N. E. 1001, 16 L. R. A. 136, 28 Am. St. Rep. 632, Chapin Cas. Torts, 99.

⁷⁰ 129 N. Y. 506, 29 N. E. 952, 14 L. R. A. 791, 26 Am. St. Rep. 539.

⁷¹ *Clark v. Buckmobile Co.*, 107 App. Div. 120, 94 N. Y. Supp. 771. And see *Quigley v. Thompson*, 211 Pa. 107, 60 Atl. 506; *Chicago, St. P., M. & O. Ry. v. Bryant*, 65 Fed. 969, 13 C. C. A. 249.

⁷² "In such cases it is and must usually remain a question depending upon the degree of deviation and all the attendant circumstances. In cases where the deviation is slight, and not unusual,

Now, it is evident that the actual authority of the servant is not in issue, since the master may be responsible, though he may have expressly forbidden the act. Nor is it necessary that he should have derived any benefit from the wrongdoing; indeed, he may have suffered separate and independent damage. Nor is the method of accomplishment the test, for the injury may have been due to negligence, or to a wanton or reckless purpose to accomplish the master's business in an unlawful manner. Where a positive duty not to be delegated is not involved, it is simply a question whether or not the servant has stepped aside from his employment to effect some object of his own and thereby committed an independent tort. For instance, plaintiff purchases from and pays defendant for a stove, which is delivered to him, but through an error is marked "C. O. D." Defendant's driver is under bond, and is personally responsible if neither merchandise so marked nor the price is returned. Plaintiff refuses to redeliver the stove or to pay the price, whereupon the driver procures his arrest. Was this done for the purpose of protecting the master's property, or that the servant himself might escape loss? It is properly a question of fact for the jury,⁷³ as is generally the case,⁷⁴ though, where neither the

the court may, and often will, as matter of law determine that the servant was still executing his master's business. So, too, where the deviation is very marked and unusual, the court in like manner may determine that the servant was not on the master's business at all, but on his own. Cases falling between these extremes will be regarded as involving merely a question of fact, to be left to the jury or other trier of such questions." *Ritchie v. Waller*, 63 Conn. 155, 161, 28 Atl. 29, 27 L. R. A. 161, 38 Am. St. Rep. 361, per Torrance J. (defendant liable, deviation apparently slight); *Loomis v. Hollister*, 75 Conn. 718, 55 Atl. 561 (same); *Whatman v. Pearson*, L. R. 3 C. P. 422 (defendant liable, deviation one-quarter of a mile). Contra: *McCarthy v. Timmins*, 178 Mass. 378, 59 N. E. 1038, 86 Am. St. Rep. 490 (not liable, though deviation apparently slight). For an act done in the course of a 15-mile deviation, master held liable in *Smith v. Spitz*, 156 Mass. 319, 31 N. E. 5.

⁷³ *Craven v. Bloomingdale*, 171 N. Y. 439, 64 N. E. 169.

⁷⁴ *Ritchie v. Waller*, 63 Conn. 155, 28 Atl. 29, 27 L. R. A. 161, 38 Am. St. Rep. 361; *Young v. South Boston Ice Co.*, 150 Mass. 527, 23 N. E. 326; *Rounds v. Delaware, L. & W. R. Co.*, 64 N. Y. 129, 21

facts nor the inference to be drawn from them is in doubt, it may be passed upon by the court.⁷⁵ Illustrative cases will be found in the note.⁷⁶ The liability of the principal for the torts of his agent is governed by the test already laid down, namely, course of employment.⁷⁷

(2) Acts Done in Violation of a Duty

Where the master owes a duty to third persons, and he commits its performance to an agent, the master cannot escape responsibility if the servant fails to perform, whether such failure be accidental or willful, or be the result of negligence or malice.⁷⁸ Under this rule defendant, who

Am. Rep. 597; *Brennan v. Merchant & Co.*, 205 Pa. 258, 54 Atl. 891; *Burns v. Poulson* L. R. 8 C. P. 563.

⁷⁵ *Walton v. New York Cent. Sleeping Car Co.*, 139 Mass. 556, 2 N. E. 101; *Aycrigg's Ex'rs v. New York & Erie R. Co.*, 30 N. J. Law, 460; *Guille v. Campbell*, 200 Pa. 119, 49 Atl. 938, 55 L. R. A. 111, 86 Am. St. Rep. 705; *Dells v. Stollenwerk*, 78 Wis. 339, 47 N. W. 431.

⁷⁶ Master liable. *Phelon v. Stiles*, 43 Conn. 426; *Andrews v. Mason City & Ft. D. R. Co.*, 77 Iowa, 669, 42 N. W. 513; *George v. Gobey*, 128 Mass. 289, 35 Am. Rep. 376; *Evans v. Davidson*, 53 Md. 245, 36 Am. Rep. 400; *Garretzen v. Duenckel*, 50 Mo. 104, 11 Am. Rep. 405; *Lannen v. Albany Gaslight Co.*, 44 N. Y. 459; *McClung v. Dearborne*, 134 Pa. 396, 19 Atl. 698, 8 L. R. A. 204, 19 Am. St. Rep. 708; *The Polaria* (D. C.) 25 Fed. 735. Master not liable. *Gillian v. South & N. A. R. Co.*, 70 Ala. 268; *Stephenson v. Southern Pac. Co.*, 93 Cal. 558, 29 Pac. 234, 15 L. R. A. 475, 27 Am. St. Rep. 223; *Brown v. Boston Ice Co.*, 178 Mass. 108, 59 N. E. 644, 86 Am. St. Rep. 469; *Keating v. Michigan Cent. R. Co.*, 97 Mich. 154, 56 N. W. 346, 37 Am. St. Rep. 328; *Snyder v. Hannibal & St. J. R. Co.*, 60 Mo. 413; *Evers v. Krouse*, 70 N. J. Law, 653, 58 Atl. 181, 66 L. R. A. 592; *Flower v. Pennsylvania R. Co.*, 69 Pa. 210, 8 Am. Rep. 251.

⁷⁷ *Hardeman v. Williams*, 150 Ala. 415, 43 South. 726, 10 L. R. A. (N. S.) 653; *Howe Mach. Co. v. Souder*, 58 Ga. 64; *Callahan v. Hyland*, 59 Ill. App. 347; *Stimpson v. Achorn*, 158 Mass. 342, 33 N. E. 518; *Larson v. Fidelity Mut. Life Ass'n*, 71 Minn. 101, 73 N. W. 711; *Wilmerding v. Postal Telegraph Cable Co.*, 118 App. Div. 685, 103 N. Y. Supp. 594, affirmed 192 N. Y. 580, 85 N. E. 1118; *Huntley v. Mathias*, 90 N. C. 101, 47 Am. Rep. 516; *Markely v. Snow*, 207 Pa. 447, 56 Atl. 999, 64 L. R. A. 685; *Pressley v. Mobile & G. R. Co.* (C. C.) 15 Fed. 199.

⁷⁸ See *Mechem on Agency*, § 740, quoted in STRANAHAN BROS.

was under contract with plaintiff to supply pure milk, was held liable for damage caused by the act of a servant who without his knowledge delivered adulterated milk, though the servant did so for the purpose of gratifying malice towards his employer.⁷⁹ Its most frequent application, however, is probably found in the case of carriers. Thus it is the latter's duty to extend courteous treatment to those whom it conveys, and a railroad will therefore be responsible to a passenger kissed by its conductor, though the latter was certainly not acting within the course of his employment, but in his own private interest.⁸⁰ A similar result was reached in other cases of malicious assault by the servants of carriers;⁸¹ and it appears logical to apply the rule to innkeepers, though the courts are not in accord.⁸²

FOR THE WRONG OF AN INDEPENDENT CONTRACTOR

54. The employer is not liable for the act or neglect of an independent contractor, unless—

- (1) The work is wrongful in itself, or involves the doing of a wrong; or—**
- (2) According to common knowledge and experience it is in its nature dangerous to others; or—**

CATERING CO. v. COIT, 55 Ohio St. 398, 45 N. E. 634, 4 L. R. A. (N. S.) 506, Chapin Cas. Torts, 102.

⁷⁹ **STRANAHAN BROS. CATERING CO. v. COIT**, *supra*.

⁸⁰ **Craker v. Chicago & N. W. R. Co.**, 36 Wis. 657, 17 Am. Rep. 504.

⁸¹ **Haver v. Central R. Co. of New Jersey**, 62 N. J. Law, 282, 41 Atl. 916, 43 L. R. A. 84, 72 Am. St. Rep. 647; **Dwinelle v. New York Cent. & H. R. R. Co.**, 120 N. Y. 117, 24 N. E. 319, 8 L. R. A. 224, 17 Am. St. Rep. 611; **Williams v. Gill**, 122 N. C. 967, 29 S. E. 879.

⁸² **Innkeeper liable. Overstreet v. Moser**, 88 Mo. App. 72; **Clancy v. Barker**, 71 Neb. 83, 98 N. W. 440, 103 N. W. 446, 69 L. R. A. (N. S.) 642, 115 Am. St. Rep. 559, 8 Ann. Cas. 682 (contract). And see **De Wolf v. Ford**, 193 N. Y. 397, 86 N. E. 527, 21 L. R. A. (N. S.) 860, 127 Am. St. Rep. 969. Contra: **Rahmel v. Lehndorff**, 142 Cal. 681, 76 Pac. 659, 65 L. R. A. 88, 100 Am. St. Rep. 154; **Clancy v. Barker**, 131 Fed. 161, 66 C. C. A. 469, 69 L. R. A. 653.

- (3) The wrong constitutes the violation of a duty imposed upon or assumed by the employer; or—
- (4) (a) The employer retains the right to direct or control the method of executing the work, or
(b) interferes and assumes control, and the injury is the result of such interference; or—
- (5) The employer ratifies the wrong; or—
- (6) The contractor is incompetent, and reasonable care was not exercised in his selection.⁸³

An independent contractor has been defined as "one who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to control of his employer, except as to the result of his work."⁸⁴ To this relation the doctrine of *respondet superior* will not in general apply, since it would be unjust to impose liability on that score for another's wrong where there has been no control over the actions of the wrongdoer.⁸⁵ But this rule is subject to several exceptions.⁸⁶

(1) *Wrongful Work.*

If an unlawful act is done pursuant to a common design, all who are parties to the understanding will be responsible as joint tort-feasors, and it makes no difference whose was the brain that planned and whose the hand that executed.

⁸³ This statement is taken with some modification from Civ. Code Ga. 1895, § 3819. See *Louisville & N. R. Co. v. Hughes*, 134 Ga. 75, 67 S. E. 542.

⁸⁴ *Powell v. Virginia Const. Co.*, 88 Tenn. 692, 697, 18 S. W. 691, 17 Am. St. Rep. 925, per Lurton, J.; *Humpton v. Unterkircher*, 97 Iowa, 509, 514, 66 N. W. 776.

⁸⁵ *ATLANTA & F. R. CO. v. KIMBERLY*, 87 Ga. 161, 13 S. E. 277, 27 Am. St. Rep. 231, Chapin Cas. Torts, 106; *Kelleher v. Schmitt & Henry Mfg. Co.*, 122 Iowa, 635, 98 N. W. 482; *Forsyth v. Hooper*, 11 Allen (Mass.) 419; *De Forrest v. Wright*, 2 Mich. 368; *Uppington v. City of New York*, 165 N. Y. 222, 59 N. E. 91, 53 L. R. A. 550; *Hexamer v. Webb*, 101 N. Y. 377, 4 N. E. 755, 54 Am. Rep. 703; *Smith v. Simmons*, 103 Pa. 32, 49 Am. Rep. 113.

⁸⁶ See *Berg v. Parsons*, 156 N. Y. 109, 115, 50 N. E. 957, 41 L. R. A. 391, 66 Am. St. Rep. 542; *ATLANTA & F. R. CO. v. KIMBERLY*, 87 Ga. 161, 13 S. E. 277, 27 Am. St. Rep. 231, Chapin Cas. Torts, 106.

This will be considered more fully later on.⁸⁷ The present exception is based upon this doctrine. Hence, if one without excuse undertakes to obstruct a public street, he becomes liable for injuries due to the nuisance, though the work was in fact done by his contractor.⁸⁸ So, too, the contract may necessarily involve the doing of an illegal act, though the primary object be not unlawful, as where the employer intrusts to a contractor the erection of a building or improvements on property held by the former, under plans which erroneously require a trespass to be made on adjoining premises,⁸⁹ or are insufficient to secure a safe construction.⁹⁰

(2) *Dangerous Work*

This exception has been stated in various ways. In one form, it is that the work must be "intrinsically dangerous" in order that the employer may be liable;⁹¹ in another, that the contract must have required an act to be performed which would probably be injurious to third persons if reasonable care was omitted in the course of its performance.⁹²

⁸⁷ See *infra*, p. 229 et seq.

⁸⁸ *Skelton v. Larkin*, 82 Hun, 388, 31 N. Y. Supp. 234, affirmed 146 N. Y. 365, 41 N. E. 90; *Ellis v. Sheffield Gas Consumers Co.*, 2 C. L. R. 249, 2 E. & B. 767, 18 Jur. 146, 23 L. J. Q. B. 42, 2 Wkly. Rep. 19, 75 E. C. L. 767.

⁸⁹ See *Mamer v. Lussem*, 65 Ill. 484; *American Car & Foundry Co. v. Spears*, 146 Ky. 736, 143 S. W. 377.

⁹⁰ *Lancaster v. Connecticut Mut. Life Ins. Co.*, 92 Mo. 460, 5 S. W. 23, 1 Am. St. Rep. 739; *Church of Holy Communion v. Paterson Extension R. Co.*, 68 N. J. Law, 330, 53 Atl. 449, 1079. Aliter where the plans are prepared by an architect selected with due care. See *Burke v. Ireland*, 26 App. Div. 487, 50 N. Y. Supp. 369.

⁹¹ *City of Joliet v. Harwood*, 86 Ill. 110, 29 Am. Rep. 17; *Laffery v. U. S. Gypsum Co.*, 83 Kan. 349, 111 Pac. 498, 45 L. R. A. (N. S.) 930, Ann. Cas. 1912A, 590; *Engel v. Eureka Club*, 137 N. Y. 100, 32 N. E. 1052, 33 Am. St. Rep. 692.

⁹² *Norwalk Gaslight Co. v. Borough of Norwalk*, 63 Conn. 495, 28 Atl. 32; *Woodman v. Metropolitan R. Co.*, 149 Mass. 335, 21 N. E. 482, 4 L. R. A. 213, 14 Am. St. Rep. 427; *Davis v. Summerfield*, 133 N. C. 325, 45 S. E. 654, 63 L. R. A. 492; *Covington & C. Bridge Co. v. Steinbrock*, 61 Ohio St. 215, 55 N. E. 618, 76 Am. St. Rep. 375; *Bower v. Peate*, 1 Q. B. D. 321, 45 L. J. Q. B. 446, 35 L. T. Rep. N. S. 321.

That there is a substantial difference between these two methods of expression appears in cases where the act may be safely done in the exercise of due care, although in the absence thereof injurious consequences to third persons would be likely to result. It may not, for instance, be intrinsically dangerous to remove a wall, and yet danger may be apprehended if the work is done carelessly or unskillfully;⁹³ and the same is true of blasting within a short distance of adjoining property.⁹⁴ Indeed, irrespective of differences in form, we find the cases in hopeless confusion upon many points, such as blasting,⁹⁵ excavating,⁹⁶ and the burning of brush.⁹⁷

It has sometimes been said that the negligence of the contractor is directly involved in the work, where the work is in its nature dangerous to others, however carefully performed, and the danger is not merely collateral to it.⁹⁸

⁹³ Thus in New York, where the "intrinsically dangerous" rule is in force, the employer was held not to be responsible. *Engel v. Eureka Club*, *supra*. Contra, *Covington & C. Bridge Co. v. Steinbrock*, *supra*.

⁹⁴ *French v. Vix*, 143 N. Y. 90, 37 N. E. 612 (employer not liable). Contra, *Wetherbee v. Partridge*, 175 Mass. 185, 55 N. E. 894, 78 Am. St. Rep. 486.

⁹⁵ As to blasting on streets, see *City of Joliet v. Harwood*, 86 Ill. 110, 29 Am. Rep. 17; *Murphy v. City of Lowell*, 124 Mass. 564; contra, *Blumb v. City of Kansas City*, 84 Mo. 112, 54 Am. Rep. 87; *Kelly v. Mayor, etc., of City of New York*, 11 N. Y. 432; *Murphy v. City of New York*, 128 App. Div. 463, 112 N. Y. Supp. 807. Blasting on premises of employer, *City of Tiffin v. McCormack*, 34 Ohio St. 638, 32 Am. Rep. 408; contra, *Cuff v. Newark & N. Y. R. Co.*, 35 N. J. Law, 17, 10 Am. Rep. 205; *McCafferty v. Spuyten Duyvil & P. M. R. Co.*, 61 N. Y. 178, 19 Am. Rep. 267.

⁹⁶ *Bonaparte v. Wiseman*, 89 Md. 12, 42 Atl. 918, 44 L. R. A. 482; *Davis v. Summerfield*, 133 N. C. 325, 45 S. E. 654, 63 L. R. A. 492; *Murphy v. Perlstein*, 73 App. Div. 256, 76 N. Y. Supp. 657; *Bower v. Peate*, 1 L. R. Q. B. D. 321, 45 L. J. Q. B. 446, 35 L. T. Rep. N. S. 321; contra, *Myer v. Hobbs*, 57 Ala. 175, 29 Am. Rep. 719; *Kepperly v. Ramsden*, 83 Ill. 354.

⁹⁷ *Cameron v. Oberlin*, 19 Ind. App. 142, 48 N. E. 386; contra, *Ferguson v. Hubbell*, 97 N. Y. 507, 49 Am. Rep. 544.

⁹⁸ *Chicago City Ry. Co. v. Hennessy*, 16 Ill. App. 153; *St. Paul Water Co. v. Ware*, 16 Wall. 566, 21 L. Ed. 485; *Hole v. Sittingbourne & S. Ry. Co.*, 6 H. & N. 488.

This does not lessen the difficulty of application in such instances as have been considered. There is, however, a substantial agreement on some points. Thus it has been generally held that where the contract, though lawful in itself, provides for interference with the public right of passage in a street, the employer must take the risk of the contractor's negligence, since the latter is directly involved,⁹⁹ or, put another way, the thing to be done would, if done in the ordinary manner, result in a nuisance.¹⁰⁰ This would include such cases as the laying of tracks,¹⁰¹ the digging of trenches for water pipes,¹⁰² sewers and drains,¹⁰³ and for access to adjoining property.¹⁰⁴ On the other hand, the erection or repair of a structure on the employer's premises ordinarily involves no danger, and negligence consisting in the dropping of material,¹⁰⁵ nailing cleats on a stair-

⁹⁹ *Robbins v. Chicago*, 4 Wall. 657, 18 L. Ed. 427.

¹⁰⁰ *Baumelster v. Markham*, 101 Ky. 122, 39 S. W. 844, 41 S. W. 816, 19 Ky. Law Rep. 308, 72 Am. St. Rep. 397. And see *Cuff v. Newark & N. Y. R. Co.*, 35 N. J. Law, 17, 10 Am. Rep. 205.

¹⁰¹ *Woodman v. Metropolitan R. Co.*, 149 Mass. 335, 21 N. E. 482, 4 L. R. A. 213, 14 Am. St. Rep. 427. Contra, *Fulton County St. R. Co. v. McConnell*, 87 Ga. 756, 13 S. E. 828. And see *Deming v. Terminal Ry. Co. of Buffalo*, 169 N. Y. 1, 61 N. E. 983, 88 Am. St. Rep. 521, where liability was based, not upon the negligence of the contractor, but upon a breach of duty to the public to keep the highway in safe condition.

¹⁰² *Colgrove v. Smith*, 102 Cal. 220, 36 Pac. 411, 27 L. R. A. 590; *Thomas v. Harrington*, 72 N. H. 45, 54 Atl. 285, 65 L. R. A. 742.

¹⁰³ *Railroad Co. v. Morey*, 47 Ohio St. 207, 24 N. E. 269, 7 L. R. A. 701; *Gray v. Pullen*, 5 B. & S. 970, 32 L. J. Q. B. 169, 34 L. J. Q. B. 265, explained in *Bower v. Peate*, 1 Q. B. D. 321, 328, 45 L. J. Q. B. 446, 35 L. T. Rep. N. S. 321.

¹⁰⁴ *Wiggin v. City of St. Louis*, 135 Mo. 558, 37 S. W. 528.

¹⁰⁵ *Hexamer v. Webb*, 101 N. Y. 377, 4 N. E. 755, 54 Am. Rep. 703; *Emmerson v. Fay*, 94 Va. 60, 26 S. E. 386; *Boomer v. Wilbur*, 176 Mass. 482, 57 N. E. 1004, 53 L. R. A. 172. Here the contract was to repair certain chimneys on defendant's buildings which adjoined the highway. There was held to be no liability for falling brick, and the distinction between danger directly and collaterally involved was clearly pointed out. For instance, if it had been necessary "to topple the chimney over into the street, or to remove the bricks by letting them fall into it, or the contract had contemplated such action," the employer would have been responsible.

way,¹⁰⁶ depositing materials in the highway,¹⁰⁷ leaving a plank walkway extending upon the sidewalk after night,¹⁰⁸ or in failing to barricade or place warning lights on obstructions deposited by him in front of the premises,¹⁰⁹ would be in a mere detail of the work. So where an independent contractor, employed to unload coal, places a run or bridge across a street to assist him in his work,¹¹⁰ or, having undertaken to transport lumber, piles it too near a railroad track.¹¹¹ Nor does the construction of a railroad on its own right of way necessarily involve the creation of a nuisance.¹¹²

(3) *Violation of a Duty*

One can no more escape liability for failure to fulfill a duty by turning its performance over to a contractor than by intrusting it to a servant. The act or neglect of the delegate will be that of his principal.

Thus, where a city is under duty to keep its streets in a safe condition for public travel, it is bound to exercise reasonable diligence to accomplish that end. When it causes an excavation to be made, it is bound to see that it is carefully guarded, so as to be reasonably free from danger to travelers, and by the weight of authority is not absolved from its duty and responsibility because it employs a contractor for the purpose.¹¹³ This obligation rests also upon

¹⁰⁶ *Louthan v. Hewes*, 138 Cal. 116, 70 Pac. 1065.

¹⁰⁷ *Hilliard v. Richardson*, 3 Gray (Mass.) 349, 63 Am. Dec. 743.

¹⁰⁸ *Richmond v. Sitterding*, 101 Va. 354, 43 S. E. 562, 65 L. R. A. 445, 99 Am. St. Rep. 879.

¹⁰⁹ *Green v. Soule*, 145 Cal. 96, 78 Pac. 337; *Hoff v. Shockley*, 122 Iowa, 720, 98 N. W. 573, 64 L. R. A. 538, 101 Am. St. Rep. 289.

¹¹⁰ *Davie v. Levy*, 39 La. Ann. 551, 2 South. 395, 4 Am. St. Rep. 225.

¹¹¹ *Wright v. Big Rapids Door & Blind Mfg. Co.*, 124 Mich. 91, 82 N. W. 829, 50 L. R. A. 495.

¹¹² *ATLANTA & F. R. CO. v. KIMBERLY*, 87 Ga. 161, 13 S. E. 277, 27 Am. St. Rep. 231, *Chapin Cas. Torts*, 106; *Cuff v. Newark & N. Y. R. Co.*, 35 N. J. Law, 17, 10 Am. Rep. 205.

¹¹³ *Mayor, etc., of Birmingham v. McCary*, 84 Ala. 469, 4 South. 630; *Brusso v. City of Buffalo*, 90 N. Y. 679; *Storrs v. City of Utica*, 17 N. Y. 104, 72 Am. Dec. 437; *Watson v. Tripp*, 11 R. I. 98, 33 Am. Rep. 420; *Wilson v. City of Wheeling*, 19 W. Va. 323, 42

one who by statute, municipal permission, or otherwise is given dominion over the highway, and who, having accepted the privileges and benefits conferred thereby, necessarily assumes corresponding liabilities.¹¹⁴ Thus the owner of an icehouse, who obtains a license from the city to incumber the street while receiving ice, cannot shield himself from responsibility for injuries caused by an obstruction negligently created, under the plea that the act was that of his contractor.¹¹⁵

The duty may be placed formally and expressly upon the employer by statute or municipal ordinance,¹¹⁶ but it need not necessarily owe its origin to such a source. "If it be a duty imposed by law, the principle is the same."¹¹⁷ Thus there is an obligation not to maintain a nuisance,¹¹⁸ and one must exercise reasonable care to make safe the premises on which he has invited others to go,¹¹⁹ for example,

Am. Rep. 780. And see *Mayor, etc., of Baltimore v. O'Donnell*, 53 Md. 110, 36 Am. Rep. 395; *Robbins v. Chicago*, 4 Wall. 657, 18 L. Ed. 427.

¹¹⁴ Thus a railroad authorized pursuant to statute to carry a public highway over its tracks will be liable for injuries due to the negligence of an independent contractor employed for the purpose, in failing properly to grade an embankment. *Deming v. Terminal Ry. of Buffalo*, 169 N. Y. 1, 61 N. E. 983, 88 Am. St. Rep. 521. To the same effect, *North Chicago St. R. Co. v. Dudgeon*, 184 Ill. 477, 56 N. E. 796.

¹¹⁵ *Darmstaetter v. Moynahan*, 27 Mich. 188.

¹¹⁶ Ordinance requiring owner of materials forming obstruction in street to place lights, *Wilson v. White*, 71 Ga. 506, 51 Am. Rep. 269; ordinance requiring erection of roofed passageway over sidewalk after completion of first story, *Smith v. Milwaukee Builders' & Traders' Exchange*, 91 Wis. 360, 64 N. W. 1041, 30 L. R. A. 504, 51 Am. St. Rep. 912. But see *Koch v. Fox*, 71 App. Div. 288, 75 N. Y. Supp. 913.

¹¹⁷ *Covington & C. Bridge Co. v. Steinbrock*, 61 Ohio St. 215, 224, 55 N. E. 618, 76 Am. St. Rep. 375.

¹¹⁸ Defendant was the occupant of a house from the front of which a heavy lamp projected over a public way. Through decay in the fastening the lamp became dangerous to travelers; hence a nuisance. Defendant was liable, though he had previously employed a contractor to put it in repair, and the latter had failed to do so. *Tarry v. Ashton*, 1 L. R. Q. B. D. 314, 45 L. J. Q. B. 260, 34 L. T. Rep. N. S. 97, 24 Wkly. Rep. 581.

¹¹⁹ *Curtis v. Kiley*, 153 Mass. 123, 26 N. E. 421.

to witness a show or exhibition which he is conducting. In the latter case it is immaterial that the performer through whose negligence the injury was caused was an independent contractor.¹²⁰ So the owner of a structure leased for entertainments impliedly warrants to the public that it is reasonably safe. He will not be exempt because the work of construction was intrusted to an architect and builder, or the invitation to the injured party was extended directly by the lessee.¹²¹

The nondelegable duty may also have been expressly assumed by contract, as where defendant agreed to supply a water tank, and sublet the job to one who furnished a tank which leaked.¹²²

(4) Reservation or Exercise of Control

It has already been seen that "independence of control in employing workmen and in selecting the means of doing the work is the test usually applied by courts to determine whether the contractor is independent or not."¹²³ Actual interference and control by the principal is not essential. It is "the right to interfere which makes the difference between an independent contractor and a servant or agent."¹²⁴ Hence whether the principal did in fact exercise the right given to him is not determinative. Thus, where a contract to take down a building provided that the work was to be done carefully "and under the direction" of de-

¹²⁰ Defendant, the proprietor of a pleasure resort, advertised as one of its attractions an exhibition of marksmanship by an armless man; liable. *Thompson v. Lowell, L. & H. St. Ry. Co.*, 170 Mass. 577, 49 N. E. 913, 40 L. R. A. 345, 64 Am. St. Rep. 323. To the same effect, *Richmond & M. Ry. Co. v. Moore*, 94 Va. 493, 27 S. E. 70, 37 L. R. A. 258 (balloon ascension).

¹²¹ *Fox v. Buffalo Park*, 21 App. Div. 321, 47 N. Y. Supp. 788.

¹²² *Butts v. J. C. Mackey Co.*, 72 Hun, 562, 25 N. Y. Supp. 531. And see *St. Paul Water Co. v. Ware*, 16 Wall. 566, 21 L. Ed. 485, where a water company, which undertook to lay pipes in a street, agreed to "protect all persons against damages by reason of excavations, * * * and to become responsible for all damages which may occur by reason of the neglect of their employés."

¹²³ *Uppington v. City of New York*, 165 N. Y. 222, 233, 59 N. E. 91, 53 L. R. A. 550, per Vann, J.

¹²⁴ *Norwalk Gaslight Co. v. Borough of Norwalk*, 63 Conn. 495, 525, 28 Atl. 32.

fendants, the latter became liable for injuries occasioned by the contractor's negligence.¹²⁵

On the other hand, if the contract gives the employer merely a right to reject or approve the work, it will not bring about this result; for such a provision does not take from the contractor his own initiative, but merely requires him to produce the result contemplated by his agreement.¹²⁶ Nor is it enough that there is a right to change, inspect, and supervise to the extent necessary to produce such result, as was held where a municipality had let the construction of a sewer under a contract which declared that the city engineer was to "have the right to regulate the excavation," and "to vary, extend, or diminish the quantity of work during its progress, without vitiating the contract," and also that "all explanations and directions necessary to carrying out and completing satisfactorily the different descriptions of the work contemplated and provided for under this contract will be given by said engineer."¹²⁷ Such provisions

¹²⁵ *Linnehan v. Rollins*, 137 Mass. 123, 50 Am. Rep. 287. To the same effect, *Parrott v. Chicago Great Western Ry. Co.*, 127 Iowa, 419, 103 N. W. 352; *Faren v. Sellers*, 39 La. Ann. 1011, 3 South. 363, 4 Am. St. Rep. 256; *Singer Mfg. Co. v. Rahn*, 132 U. S. 518, 10 Sup. Ct. 175, 33 L. Ed. 440; *Railroad Co. v. Hanning*, 16 Wall. 649, 21 L. Ed. 220.

¹²⁶ So held with respect to the following clauses: "Subject to the inspection and approval of the said engineer * * * in charge of said work." *Casement v. Brown*, 148 U. S. 615, 13 Sup. Ct. 672, 37 L. Ed. 582. "All work to be done to the satisfaction of," etc. *Eldred v. Mackie*, 178 Mass. 1, 59 N. E. 673. See, also, *Alabama Midland R. Co. v. Martin*, 100 Ala. 511, 14 South. 401; *Thomas v. Altoona & L. V. Electric Ry. Co.*, 191 Pa. 361, 43 Atl. 215. Authorities are reviewed in *Larsen v. Home Telephone Co.*, 164 Mich. 295, 129 N. W. 894. "It seems to be settled law that, where one person lets a contract to another to do a particular work, reserving to himself no control over the manner in which the work shall be performed, except that it shall conform to a particular standard when completed, he is not liable for any injury which may occur to others by reason of any negligence of the person to whom the contract is let." *Vincennes Water Supply Co. v. White*, 124 Ind. 376, 379, 24 N. E. 747, 748.

¹²⁷ *Uppington v. City of New York*, 165 N. Y. 222, 59 N. E. 91, 53 L. R. A. 550. To the same effect: *Callan v. Bull*, 113 Cal. 593, 45

do not authorize any interference with the manner in which the work is to be done.¹²⁸ Nor is it enough that there is a stipulation embodied in the contract requiring the contractor to discharge a workman who should disobey any directions of the principal as to workmanship or material.¹²⁹

If a reservation of the right to control the means of doing the work will establish the relation of master and servant, and cause the doctrine of *respondeat superior* to apply, then *a fortiori* such must be the case where the employer has interfered and the injury is the result of such interference.¹³⁰

(5) Ratification

Although originally not responsible, the principal may subject himself to liability by ratifying the wrongful act of the contractor, as if an encroachment should have been made on adjoining property and the principal should thereafter take and hold possession of the encroaching structure.¹³¹ But, as this is governed by the general rules ap-

Pac. 1017 (engineer to have power to prescribe order in which materials are to be placed and work to be done and materials furnished as directed by him); *Lenderink v. Rockford*, 135 Mich. 531, 98 N. W. 4 (sewer construction; engineer was to see that tile was laid to proper depth and in proper manner after trench was dug); *Vosbeck v. Kellogg*, 78 Minn. 176, 80 N. W. 957 ("all said work to be performed and material to be furnished under the supervision and subject to the approval," etc.). And see *Harrison v. Kiser*, 79 Ga. 588, 4 S. E. 320; *Fitzpatrick v. Chicago & W. I. R. Co.*, 31 Ill. App. 649; *Hump-ton v. Unterkircher*, 97 Iowa, 509, 66 N. W. 776; *Johnson v. Carolina, C. & O. R. Co.*, 157 N. C. 382, 72 S. E. 1057; *Hughes v. Cincinnati & S. Ry. Co.*, 39 Ohio St. 461; *Smith v. Milwaukee Builders' & Traders' Exchange*, 91 Wis. 360, 64 N. W. 1041, 30 L. R. A. 504, 51 Am. St. Rep. 912.

¹²⁸ See *Pack v. Mayor, etc., of City of New York*, 8 N. Y. 222.

¹²⁹ *Blumb v. Kansas City*, 84 Mo. 112, 54 Am. Rep. 87. And see *Uppington v. City of New York*, 165 N. Y. 222, 59 N. E. 91, 53 L. R. A. 550; *Hobbit v. London & N. W. Ry. Co.*, 4 Exch. 254.

¹³⁰ *Eaton v. European & N. A. Ry. Co.*, 59 Me. 520, 8 Am. Rep. 430; *Appel v. Eaton & Prince Co.*, 97 Mo. App. 428, 71 S. W. 741; *Baldwin v. Abraham*, 57 App. Div. 67, 67 N. Y. Supp. 1079, affirmed 171 N. Y. 677, 64 N. E. 1118; *Ardesco Oil Co. v. Gilson*, 63 Pa. 146.

¹³¹ *Eaton v. European & N. A. Ry. Co.*, 59 Me. 520, 8 Am. Rep. 430.

plicable to the adoption of wrongs actually committed by another, it will not be discussed here.¹³² It has sometimes been said that on this theory, if the contractee resume possession of work imperfectly constructed or in a dangerous condition, when he knew or should have known of the defect or danger, he will be liable for all damages thereafter accruing.¹³³ It is submitted, however, that the doctrine of ratification is not the true basis of these decisions covering the acceptance of defectively done work. By his acceptance the employer does not make himself a party to a preceding act or neglect of the contractor. His liability is prospective only, and is for the maintenance of the dangerous structure or other nuisance with knowledge, actual or presumed, of its dangerous qualities. It cannot be stretched to cover injuries received prior to the time the acceptance or resumption of control took place, as would be the case were there a true ratification involved. Necessarily, however, the case must be one where the work contracted for did not involve the creation of a nuisance,¹³⁴ for then there was original participation. The question, therefore, really is as to the general duty imposed upon all owners of property to keep in safe condition the premises under their dominion.¹³⁵ Indeed, this has been carried to the extent

¹³² See *infra*, p. 234 et seq.

¹³³ *Sipe v. Pennsylvania R. Co.*, 222 Pa. 400, 71 Atl. 847, and see *Bast v. Leonard*, 15 Minn. 304 (Gil. 235); *Read v. East Providence Fire Dist.*, 20 R. I. 574, 40 Atl. 760. Semble that liability would arise after acceptance, irrespective of such knowledge, actual or presumed. *Mulchey v. Methodist Religious Society*, 125 Mass. 487; *Gorham v. Gross*, 125 Mass. 232, 28 Am. Rep. 224.

¹³⁴ *Wilkinson v. Detroit Steel & Spring Works*, 73 Mich. 405, 41 N. W. 490.

¹³⁵ See *Khron v. Brock*, 144 Mass. 516, 519, 11 N. E. 748, 751, where the instructions evidently were that the principal was only to be held responsible for the unsafe condition of the building itself, and not for any carelessness of the contractor in actually performing the work. "It cannot be contended," said the court, "that if the work was completed the owner would not be responsible for injuries resulting from the imperfect construction or dangerous condition *in which it was permitted by him to remain.*" But see *Vogel v. City of New York*, 92 N. Y. 10, 19, 44 Am. Rep. 349, where it was ob-

of holding that liability arises where the contractor fails to finish the work by the time set and the employer neglects to assume control and complete it.¹³⁶

(6) Lack of Care in Selecting Competent Contractor

A further exception which has received support, though chiefly by dicta, is where the employer either knew the incompetency of the contractor or failed to exercise reasonable care in his selection.¹³⁷ It has been said, however, that this applies only to exceptional cases when the work is necessarily intrinsically hazardous.¹³⁸ What limitations, if any, are to be placed upon this doctrine—indeed, its very existence—cannot be regarded as settled, owing to a lack of authority.¹³⁹

PARTNERS

55. "Where by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his copartners, loss or injury is caused to any person, not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act."¹⁴⁰

served that liability is "for the creation of the nuisance, upon a principle very similar to that which makes a principal responsible for unauthorized wrongs committed by an agent by ratifying them."

¹³⁶ *Vogel v. City of New York*, 92 N. Y. 10, 44 Am. Rep. 349. This was a very aggravated case. The contractor had undertaken to grade one of defendant's streets, under an agreement which gave the city the right to finish the work, if not completed. Excavations were made, which diverted water on plaintiff's premises. The work was delayed and practically abandoned for about 14 years.

¹³⁷ *Norwalk Gaslight Co. v. Borough of Norwalk*, 63 Conn. 495, 28 Atl. 32; *Brannock v. Elmore*, 114 Mo. 55, 21 S. W. 451.

¹³⁸ *Schip v. Pabst Brewing Co.*, 64 Minn. 22, 66 N. W. 3.

¹³⁹ In New York it is apparently denied. See *Berg v. Parsons*, 156 N. Y. 109, 50 N. E. 957, 41 L. R. A. 391, 66 Am. St. Rep. 542; *Hawke v. Brown*, 28 App. Div. 37, 50 N. Y. Supp. 1032; *Fox v. Ireland*, 46 App. Div. 541, 61 N. Y. Supp. 1061; *Id.*, 60 App. Div. 629, 70 N. Y. Supp. 1139.

¹⁴⁰ Taken from the English Partnership Act, 53 and 54 Vict. c. 39, § 10.

There can be no question of liability where prior express authorization or subsequent ratification is shown. Hence there are here considered only cases where the firm is sought to be held merely because the wrongdoer was a member. A partner is viewed as an agent of his partnership while acting within the course of its business, and consequently the rules under which the principal may be liable would here apply. There is some sanction for the view that there can be no implied authority to commit an illegal act,¹⁴¹ but this does not generally prevail, nor can it be supported on reason.¹⁴² Thus the fellow partners of the wrongdoer have been held liable for the latter's conversion,¹⁴³ fraud,¹⁴⁴ negligence,¹⁴⁵ defamation,¹⁴⁶ and violation of the revenue laws.¹⁴⁷ Such wrongs were found to have been committed within the course of the partnership business, and this is the true test; for it makes no difference that the act was illegal or willful. On the other hand, the placing of a libelous placard in the store window is not within the scope of a business consisting of the sale of furniture and draperies,¹⁴⁸ and, since giving away goods is not properly within the operations of a firm of apothecaries, one member will

¹⁴¹ *Marks v. Hastings*, 101 Ala. 165, 13 South. 297 (malicious prosecution); *Kirk v. Garrett*, 84 Md. 383, 35 Atl. 1089; *Graham v. Meyer*, Fed. Cas. No. 5,673, 4 Blatchf. 129 (usury).

¹⁴² "Surely it is more reasonable that the copartners who have held out this one as a fit and proper person to act in protecting the firm's interests should suffer for his defects of temper and errors of judgment rather than those who have reposed no confidence in him and made no representations as to his fitness." *Burdick on Partnership*, 217.

¹⁴³ *Gilchrist v. Brande*, 58 Wls. 184, 15 N. W. 817.

¹⁴⁴ *Wolf v. Mills*, 56 Ill. 360; *Stanhope v. Swafford*, 80 Iowa, 45, 45 N. W. 403; *Locke v. Stearns*, 1 Metc. (Mass.) 560, 35 Am. Dec. 382; *Chester v. Dickerson*, 54 N. Y. 1, 13 Am. Rep. 550.

¹⁴⁵ *Linton v. Hurley*, 14 Gray (Mass.) 191; *Dudley v. Love*, 60 Mo. App. 420; *Livingston v. Cox*, 6 Pa. 360.

¹⁴⁶ *Lothrop v. Adams*, 133 Mass. 471, 43 Am. Rep. 528; *Haney Mfg. Co. v. Perkins*, 78 Mich. 1, 43 N. W. 1073.

¹⁴⁷ *Stockwell v. U. S.*, 13 Wall. 531, 20 L. Ed. 491.

¹⁴⁸ *Woodling v. Knickerbocker*, 31 Minn. 268, 17 N. W. 387.

not be liable for the act of the other in making a present of what was supposed to be extract of dandelion, but which proved to be belladonna.¹⁴⁹

OWNERS¹⁵⁰

56. The responsibility which the owner of property may incur because of the acts or neglect of others will here be treated in cases where the relationship arose out of—

- (A) Lease;
- (B) License; and—
- (C) Bailment.

The lessee or tenant, the licensee, and the bailee are not to be regarded as agents of lessor or landlord, licensor, or bailor, merely because of the position which they occupy towards the latter. The doctrine of *respondeat superior* will not therefore apply,¹⁵¹ unless agency be affirmatively established, as where the tenant has been authorized to make repairs, and he does it inefficiently, so that third persons are injured.¹⁵²

But where the element of participation is shown, responsibility will exist. For instance, the fact that premises are in the

¹⁴⁹ *Gwynn v. Duffield*, 66 Iowa, 708, 24 N. W. 523, 55 Am. Rep. 286. See, further, *Schwabacker v. Riddle*, 84 Ill. 517; *Linn v. Ross*, 16 N. J. Law, 55.

¹⁵⁰ For duty of occupant of real property, see *infra*, p. 503 et seq.

¹⁵¹ Lessor. *Allen v. Smith*, 76 Me. 335; *Caldwell v. Slade*, 156 Mass. 84, 30 N. E. 87; *Sargent v. Stark*, 12 N. H. 832; *Martin v. Pettit*, 117 N. Y. 118, 22 N. E. 566, 5 L. R. A. 794. Bailor. *Herlihy v. Smith*, 116 Mass. 265; *Braverman v. Hart* (Sup.) 105 N. Y. Supp. 107; *McColligan v. Pennsylvania R. Co.*, 214 Pa. 229, 63 Atl. 792, 6 L. R. A. (N. S.) 544, 112 Am. St. Rep. 739.

¹⁵² See *White v. Montgomery*, 58 Ga. 204. The landlord is liable if he assumed the performance of a duty the violation of which has produced injury, as if he has agreed to keep the demised premises in repair. *City of Peoria v. Simpson*, 110 Ill. 294, 51 Am. Rep. 683; *Clancy v. Byrne*, 56 N. Y. 129, 15 Am. Rep. 391. Though here responsibility is predicated on his personal wrong.

lessee's possession will not constitute a defense, where the injury was caused by the very use for which they were demised, and the landlord knew or should have known that such use might reasonably be expected to produce that result. "Whoever for his own advantage authorizes his property to be used by another in such manner as to endanger and injure unnecessarily the property or rights of others is answerable for the consequences."¹⁵³ Accordingly one who leases a mill having an overshot wheel, which when in motion is likely to frighten horses,¹⁵⁴ or a kiln, whose use is dangerous to an adjoining house,¹⁵⁵ will be responsible for the damage.¹⁵⁶ But knowledge, actual or presumed, that the letting was for a purpose likely to prove injurious must be established.¹⁵⁷ Participation is likewise shown where rent is received for the nuisance with knowledge thereof.¹⁵⁸ The rule is the same as to licensors,

¹⁵³ *Boston Beef Packing Co. v. Stevens* (C. C.) 12 Fed. 279, 280, 20 Blatchf. 443, per Wallace, C. J. Here an unsafe building had been leased for storage purposes.

¹⁵⁴ *House v. Metcalf*, 27 Conn. 631.

¹⁵⁵ *Helwig v. Jordan*, 53 Ind. 21, 21 Am. Rep. 189.

¹⁵⁶ "It has been said that the owner is responsible: (1) If he creates a nuisance and maintains it. (2) If he creates a nuisance and then demises the land with the nuisance thereon. (3) If the nuisance was erected on the land by a prior owner or by a stranger and he knowingly maintains it. (4) If he has demised premises and covenanted to keep them in repair, and omits to repair and thus they become a nuisance. (5) If he demises premises to be used as a nuisance or for a business or in a way so that they will necessarily become a nuisance. *Ahern v. Steele*, 115 N. Y. 203, 22 N. E. 193, 5 L. R. A. 449, 12 Am. St. Rep. 778. See, also, *Riley v. Simpson*, 83 Cal. 217, 23 Pac. 293, 7 L. R. A. 622; *Kalls v. Shattuck*, 69 Cal. 593, 11 Pac. 346, 58 Am. Rep. 568. It is evident that in the second and fifth classes, particularly in the latter, the landlord's liability will extend to injuries which are actually the result of the tenant's misfeasance or nonfeasance, although made possible by the antecedent act of the lessor. In the other classes, the landlord is held accountable because his own act or omission has directly produced the injury." 38 Cyc. 482, note 84.

¹⁵⁷ *Flsh v. Dodge*, 4 Denio (N. Y.) 311, 47 Am. Dec. 254.

¹⁵⁸ *Board of Health of New Rochelle v. Valentine*, 57 Hun, 591, 11 N. Y. Supp. 112; *Roswell v. Prior*, 1 Ld. Raym. 713, 91 Eng. Repr. 1375.

who are liable if they knowingly permit the licensee to maintain the dangerous condition.¹⁵⁹

Participation by bailors would appear where dangerous articles are intrusted to those who are known or should have been known to be unable to appreciate the peril or to exercise proper care. Necessarily there is bound to be some difficulty in fitting this rule to given circumstances. It would, for instance, apply where a loaded gun had been intrusted to a young child.¹⁶⁰ Though the principle seems clear, direct authority appears to be lacking.

JOINT AND SEVERAL LIABILITY—HOW ARISING

57. The responsibility of two or more individuals for a single tort may arise out of—

- (A) Connivance;
- (B) Concert of action;
- (C) Production of a single injury;
- (D) Relationship;
- (E) Ratification.

In General

Hitherto the subject has been viewed as though there were but a single wrongdoer. But a tort may have been committed under such circumstances that two or more may be held for the resulting injury. It is therefore the method of accomplishment which is determinative, and not the inherent nature of the specific wrong; for it is conceivable that every tort may be made the subject of a joint action. It has been thought that slander is essentially single, since, though the same words are uttered by two or more,

¹⁵⁹ *Inhabitants of Rockport v. Rockport Granite Co.*, 177 Mass. 246, 58 N. E. 1017, 51 L. R. A. 779.

¹⁶⁰ *Dixon v. Bell*, 5 M. & S. 198, 105 Eng. Repr. 1023, 1 Stark. 287, 2 E. C. L. 114, 17 Rev. Rep. 308. And see *Salisbury v. Erie R. Co.*, 66 N. J. Law, 233, 50 Atl. 117, 88 Am. St. Rep. 480, though the decision was not upon the point stated in the text.

"the words of one are not the words of the other";¹⁶¹ but this is not true, since there may be a union of mind and thought in the utterance.¹⁶² True, the repetition of defamatory words is no part of the original slander. But it may well be that the two slanders were uttered pursuant to a common agreement.¹⁶³

(A) Connivance

He who commands, directs, advises, or procures the commission of a tort by another is responsible as if he had done it with his own hands.¹⁶⁴ Thus, where one sold a mill standing on the lot of a neighbor and appointed a day for the purchaser to take it away, promising to aid him if assistance was necessary, and the mill was subsequently removed by the purchaser it was held that the purported vender was liable in an action of trespass, though there was no proof that he was present at the removal.¹⁶⁵ But there exists no legal duty to disclose to another that a wrong is being or will be perpetrated against him. Mere silent observation is not sufficient.¹⁶⁶ Nor is mere acquiescence. Thus one who simply permits a tort to be committed is not a joint tort-feasor,¹⁶⁷ as where the owner of land in the possession of a tenant gave leave to bury a horse there.¹⁶⁸ Nor is one who was physically present when the wrong was

¹⁶¹ *Chamberlaine v. Willmore*, Palm. 313, 81 Eng. Repr. 1099; *Chamberlaine v. Goodwin*, Cro. Jac. 647, 79 Eng. Repr. 558.

¹⁶² *Patten v. Gurney*, 17 Mass. 182, 9 Am. Dec. 141.

¹⁶³ *Green v. Davies*, 182 N. Y. 499, 75 N. E. 536, 3 Ann. Cas. 310; *Chesebro v. Powers*, 78 Mich. 472, 44 N. W. 290 (slander of title).

¹⁶⁴ *Graham v. Dahlonga Gold Mining Co.*, 71 Ga. 296; *Moir v. Hopkins*, 16 Ill. 313, 63 Am. Dec. 312; *Judson v. Cook*, 11 Barb. (N. Y.) 642. For conspiracy, see *infra*, p. 580 et seq.

¹⁶⁵ *Wall v. Osborn*, 12 Wend. (N. Y.) 39. To the same effect, *Reed v. Peck*, 163 Mo. 333, 63 S. W. 734; *Daingerfield v. Thompson*, 74 Va. 136, 36 Am. Rep. 783.

¹⁶⁶ *Brannock v. Bouldin*, 26 N. C. 61. Here defendants were aware that a third party, though then married and insolvent, was endeavoring to procure plaintiff's consent to a marriage with his daughter and to become surety on a note, but gave no warning.

¹⁶⁷ *Robinson v. Vaughton*, 8 C. & P. 252.

¹⁶⁸ *Fitzwater v. Fassett*, 199 Pa. 442, 49 Atl. 310.

committed,¹⁶⁹ though it is evident that encouragement or incitement by words, gestures, or otherwise will turn the scale,¹⁷⁰ and proof that the defendant was present, without disapproving or opposing it, is evidence from which, in connection with other circumstances, the jury may infer connivance or participation.¹⁷¹

(B) Concert of Action

This arises where the parties are engaged in an unlawful enterprise. Their common design will render each responsible for all acts done by the others pursuant thereto. For instance, where two are unlawfully racing, and a third person is injured through the negligence of one, both are liable;¹⁷² so where there was a common intent to commit an assault, which was in fact done by one.¹⁷³ Cases of concert are usually treated as conspiracy.

(C) Production of Single Injury

Connivance and concert may be lacking, and still the parties be considered joint tort-feasors, if their separate and independent acts or neglects have produced a single injury. The following are illustrative: A passenger was injured by a collision, due to the combined negligence of his carrier and a third party;¹⁷⁴ through the negligence of one contractor water flowed from the roof, through that of another it flow-

¹⁶⁹ *Hilmes v. Stroebel*, 59 Wis. 74, 17 N. W. 539.

¹⁷⁰ *Reed v. Peck*, 163 Mo. 333, 63 S. W. 734. And see *Grinnell v. Weston*, 95 App. Div. 454, 88 N. Y. Supp. 781.

¹⁷¹ *Brown v. Perkins*, 1 Allen (Mass.) 89; *Will v. Lucas*, 110 Mo. 219, 19 S. W. 726, 33 Am. St. Rep. 436.

¹⁷² *Hanrahan v. Cochran*, 12 App. Div. 91, 42 N. Y. Supp. 1031. And see *Banfield v. Whipple*, 10 Allen (Mass.) 27, 87 Am. Dec. 618.

¹⁷³ See *Smithwick v. Ward*, 52 N. C. 64, 75 Am. Dec. 453; *Kirkwood v. Miller*, 37 Tenn. (5 Sneed) 455, 73 Am. Dec. 134. See, further, *Gunder v. Tibbits*, 153 Ind. 591, 35 N. E. 762; *Price v. Price*, 91 Iowa, 693, 60 N. W. 202, 29 L. R. A. 150, 51 Am. St. Rep. 360; *White v. Turner*, 40 Ky. (1 B. Mon.) 130; *Bath v. Metcalf*, 145 Mass. 274, 14 N. E. 133, 1 Am. St. Rep. 455; *Clay v. Waters*, 161 Fed. 813, 88 C. C. A. 633.

¹⁷⁴ *Cuddy v. Horn*, 46 Mich. 596, 10 N. W. 32, 41 Am. Rep. 178; *Flaherty v. Minneapolis & St. Louis Ry. Co.*, 39 Minn. 328, 40 N. W. 160, 1 L. R. A. 680, 12 Am. St. Rep. 654; *Barrett v. Third Ave. Ry. Co.*, 45 N. Y. 628.

ed from the street, and both bodies of water joined in the cellar, forming one, which found its way into an adjacent building;¹⁷⁵ an electric street railway and a telephone company each maintained a wire which was likely to fall across the other and cause injury, and the wire of the telephone company broke and, falling across the trolley wire, became charged with electricity, resulting in the death of plaintiff's horse, which had come in contact therewith.¹⁷⁶ In cases coming under this rule it will make no difference that it is impossible to determine what portion of the injury was caused by each,¹⁷⁷ or that the act or neglect of each alone might not have produced the result.¹⁷⁸

There must have been a single injury, not separate and distinct injuries, each caused by one of the wrongdoers; for in the latter event the liability is several only. The difficulty of separating effects will not make the tort joint. Hence where animals, each of which is separately owned, do damage together, as the wrong is individual, each owner is responsible only for the damage done by his animal.¹⁷⁹ Nor can torts, several when committed, give rise to a joint

¹⁷⁵ *SLATER v. MERSEREAU*, 64 N. Y. 138, Chapin Cas. Torts, 111.

¹⁷⁶ *McKay v. Southern Bell Telegraph & Telephone Co.*, 111 Ala. 337, 19 South. 695, 31 L. R. A. 589, 56 Am. St. Rep. 59. For further illustrations, see *Kansas City v. Slangstrom*, 53 Kan. 431, 36 Pac. 706; *Newman v. Fowler*, 37 N. J. Law, 89; *Simmons v. Everson*, 124 N. Y. 319, 26 N. E. 911, 21 Am. St. Rep. 676; *Walton, Witten & Graham v. Miller's Adm'x*, 109 Va. 210, 63 S. E. 458, 132 Am. St. Rep. 908; *Brown v. Coxe Bros. & Co.* (C. C.) 75 Fed. 689.

¹⁷⁷ *Allison v. Hobbs*, 96 Me. 26, 51 Atl. 245; *Corey v. Havener*, 182 Mass. 250, 65 N. E. 69; *Boston & A. R. Co. v. Shanly*, 107 Mass. 568.

¹⁷⁸ *Nordhaus v. Vandalla R. Co.*, 242 Ill. 166, 89 N. E. 974.

¹⁷⁹ *Nierenberg v. Wood*, 59 N. J. Law, 112, 35 Atl. 654; *Auchmuty v. Ham*, 1 Denio (N. Y.) 495; *Van Steenburgh v. Tobias*, 17 Wend. (N. Y.) 562, 31 Am. Dec. 310. Contra, *Nelson v. Nugent*, 106 Wis. 477, 82 N. W. 287, 80 Am. St. Rep. 51. For further illustrations, see *Millard v. Miller*, 39 Colo. 103, 88 Pac. 845; *Wert v. Potts*, 76 Iowa, 612, 41 N. W. 374, 14 Am. St. Rep. 252; *Mooney v. Third Ave. R. Co.*, 2 City Ct. R. (N. Y.) 366.

action merely because of a combination of their consequences.¹⁸⁰

(D) Relationship

Though the original enterprise was not unlawful, and though there has been no connivance or concert of action with respect to the wrong suffered, yet there may be joint liability, because the relationship of the parties has made one responsible for a wrong done by the other. When this responsibility will arise has already been discussed. Hence it is generally held that a single action may be brought against master and servant,¹⁸¹ principal and agent,¹⁸² partner and partner,¹⁸³ lessor and lessee,¹⁸⁴ and co-owners.¹⁸⁵

¹⁸⁰ Thus, where plaintiff's dam became filled by deposits of coal dirt from mines, some of which were worked by defendants and others by third parties, as the tort consisted in throwing the dirt into the stream, it was necessarily single, and the deposit being but a consequence, the fact that it united with others did not make the defendants responsible for the entire results. *LITTLE SCHUYLKILL NAVIGATION R. & COAL CO. v. RICHARDS' ADM'R*, 57 Pa. 142, 98 Am. Dec. 209, Chapin Cas. Torts, 113. And see *Chipman v. Palmer*, 77 N. Y. 51, 33 Am. Rep. 566 (pollution of stream); *Harley v. Merrill Brick Co.*, 83 Iowa, 73, 48 N. W. 1000 (nuisances separately maintained); *Harriott v. Plimpton*, 166 Mass. 585, 44 N. E. 992 (slander).

¹⁸¹ *Wright v. Compton*, 53 Ind. 337; *Whalen v. Pennsylvania R. Co.*, 73 N. J. Law, 192, 63 Atl. 993; *Montfort v. Hughes*, 3 E. D. Smith (N. Y.) 591; *Hough v. Southern R. Co.*, 144 N. C. 692, 57 S. E. 469. By the Massachusetts courts a distinction is drawn between actions in trespass and in case. Where case alone lies, as where the servant's negligence is the gravamen, a joint action will not lie. *Mulchey v. Methodist Religious Society*, 125 Mass. 487; *Hewett v. Swift*, 3 Allen (Mass.) 420. The federal courts have refused to permit joint actions where the master is not guilty of contributing fault. *McIntyre v. Southern Ry. Co.* (C. C.) 131 Fed. 985; *Shaffer v. Union Brick Co.* (C. C.) 128 Fed. 97; *Helms v. Northern Pac. Ry. Co.* (C. C.) 120 Fed. 389.

¹⁸² *Mayer v. Thompson-Hutchison Bldg. Co.*, 104 Ala. 611, 16 South. 620, 28 L. R. A. 433, 53 Am. St. Rep. 88; *Phelps v. Walt*, 30 N. Y. 78.

¹⁸³ *Chester v. Dickerson*, 54 N. Y. 1, 13 Am. Rep. 550; *Moreton v. Hardern*, 4 B. & C. 223, 6 D. & R. 275, 10 E. C. L. 553, 107 Eng. Repr. 1042.

¹⁸⁴ *West Chicago St. R. Co. v. Horne*, 197 Ill. 250, 64 N. E. 331.

¹⁸⁵ *Oakes v. Spaulding*, 40 Vt. 347, 94 Am. Dec. 404.

(E) Ratification

If a tort has been committed on another's behalf, though primarily the latter may not be liable, he may become so by ratifying it with full knowledge of all material facts. Though the logic of this has been questioned,¹⁸⁶ the principle is settled.¹⁸⁷ Thus, if a sheriff sell the goods of a stranger, and the judgment creditor, knowing the facts, receive the proceeds, he will be answerable to the real owner.¹⁸⁸ So the principal may ratify the wrong of an independent contractor.¹⁸⁹

Analyzing the rule as stated, the following points become clear:

First. Mere knowledge, acquiescence, approval, or satisfaction will be insufficient, in the absence of an intent, expressly declared or shown from circumstances, to adopt the wrong,¹⁹⁰ though there is possibly an exception where the act has been done simply in excess of authority conferred by the party sought to be charged, in which case mere ap-

¹⁸⁶ Thus, where one not a servant of defendant delivered a load of coal to plaintiff, and through careless driving broke a window, it was held that defendant, by presenting a bill for the coal with knowledge of this fact, had established the relation of master and servant *ab initio*. It was observed that, "if we were contriving a new code to-day, we might hesitate to say that a man could make himself a party to a bare tort in any case merely by assenting to it after it had been committed. But we are not at liberty to refuse to carry out to its consequences any principle which we believe to have been part of the common law, simply because the grounds of policy on which it must be justified seem to us to be hard to find and probably to have belonged to a different state of society." *DEMPSEY v. CHAMBERS*, 154 Mass. 330, 331, 28 N. E. 279, 13 L. R. A. 219, 26 Am. St. Rep. 249, Chapin Cas. Torts, 116, per Holmes, J.

¹⁸⁷ *Street v. Sinclair*, 71 Ala. 110; *Avakian v. Noble*, 121 Cal. 216, 53 Pac. 559; *Judd v. Walker*, 114 Mo. App. 128, 89 S. W. 558; *Forbes v. Hagman*, 75 Va. 168.

¹⁸⁸ *Brainerd v. Dunning*, 30 N. Y. 211. And see *Stuart v. Chapman*, 104 Me. 17, 70 Atl. 1069; *Cook v. Hopper*, 23 Mich. 511.

¹⁸⁹ *ATLANTA & F. R. CO. v. KIMBERLY*, 87 Ga. 161, 13 S. E. 277, 27 Am. St. Rep. 231, Chapin Cas. Torts, 106, though held that the facts did not show ratification.

¹⁹⁰ *Tucker v. Jerris*, 75 Me. 184; *Adams v. Freeman*, 9 Johns. (N. Y.) 117; *Hyde v. Cooper*, 26 Vt. 552; *Hubbard v. Hunt*, 41 Vt. 376.

proval may be sufficient.¹⁹¹ But a principal will not be responsible for an act which was no part of the transaction which he ratified.¹⁹²

Second. The act must have been done for the benefit of the alleged adopter, or have been of a nature to benefit him. As put by Lord Coke: "He that agreeth to a trespass after it is done is no trespasser, unless the trespass was done to his use or for his benefit, and then his agreement subsequent amounteth to a commandment."¹⁹³ Thus, where a father gave to an agent a sum of money for the purpose of paying certain debts owed by his son, and the agent handed a portion to the son, so that he might abscond, the mere fact that, in a settlement between father and agent, the former allowed the latter's bill for the money thus applied, does not work a ratification, and make the father responsible in an action for removing a debtor.¹⁹⁴

Third. There must have been full knowledge of the facts constituting the wrong, or a purpose to assume the consequences in any event.¹⁹⁵ Thus a landlord, who had authorized bailiffs to distrain for rent, directing them not to take anything except on the demised premises, will not be liable for property taken elsewhere, the proceeds of which were received by him, unless he knew of the irregularity, or chose without inquiry to take the risk upon himself.¹⁹⁶

¹⁹¹ *Brown v. Webster City*, 115 Iowa, 511, 88 N. W. 1070.

¹⁹² *Manning v. Keenan*, 73 N. Y. 45.

¹⁹³ 4 Inst. 317. And see *Russo v. Maresca*, 72 Conn. 51, 43 Atl. 552; *Reed v. Rich*, 49 Ill. App. 262; *Wamsganz v. Wolff*, 86 Mo. App. 205; *Hamlin v. Sears*, 82 N. Y. 327.

¹⁹⁴ *Moore v. Rogers*, 51 N. C. 297.

¹⁹⁵ *Herring v. Skaggs*, 73 Ala. 446; *Tucker v. Jerris*, 75 Me. 184; *Buttrick v. City of Lowell*, 1 Allen (Mass.) 172, 79 Am. Dec. 721; *Hollday v. Jackson*, 30 Mo. App. 263; *Adams v. Freeman*, 9 Johns. (N. Y.) 118; *Eastern Counties R. Co. v. Broom*, 6 Exch. 314.

¹⁹⁶ *Lewis v. Read*, 14 L. J. Exch. 295, 13 M. & W. 834.

JOINT AND SEVERAL LIABILITY—RESULTS

58. Where liability is joint and several, the party wronged may sue one, any, or all the wrongdoers. Generally, none of the latter can enforce indemnity or contribution as against the others.

All the tort-feasors are equally responsible. The amount of culpability, extent of participation or degree of negligence of each cannot be compared and measured.¹⁹⁷ Merely because one is exempt from suit, on grounds of public policy, will not result in freeing the others.¹⁹⁸ The injured party is at liberty to elect against whom he shall proceed. He may sue one, any, or all the joint tort-feasors, and the separate actions may be brought simultaneously or successively.¹⁹⁹

In a single action, a verdict or judgment may be rendered for or against any or all;²⁰⁰ but the damages must be assessed in a single sum. The jury cannot apportion them among the defendants, for the sole inquiry is what loss has

¹⁹⁷ Consolidated Ice Mach. Co. v. Keifer, 134 Ill. 481, 25 N. E. 799, 10 L. R. A. 696, 23 Am. St. Rep. 688; Sternfels v. Metropolitan St. R. Co., 73 App. Div. 494, 77 N. Y. Supp. 309, affirmed 174 N. Y. 512, 66 N. E. 1117; Clark v. Patapsco Guano Co., 144 N. C. 64, 56 S. E. 858, 119 Am. St. Rep. 931; Bunting v. Hogsett, 139 Pa. 363, 21 Atl. 31, 33, 34, 12 L. R. A. 268, 23 Am. St. Rep. 192; Brown v. Cox Bros. & Co. (C. C.) 75 Fed. 689.

¹⁹⁸ Thus one who suborns a witness to swear falsely to defamatory statements is liable, though the witness is protected. Rice v. Coolidge, 121 Mass. 393, 23 Am. Rep. 279.

¹⁹⁹ Sparrow v. Bromage, 83 Conn. 27, 74 Atl. 1070, 27 L. R. A. (N. S.) 209, 19 Ann. Cas. 796; Nordhaus v. Vandalla R. Co., 242 Ill. 166, 89 N. E. 974; Allison v. Hobbs, 96 Me. 26, 51 Atl. 245; Corey v. Havener, 182 Mass. 250, 63 N. E. 69; Newman v. Fowler, 37 N. J. Law, 89; Roberts v. Johnson, 58 N. Y. 613.

²⁰⁰ Sparrow v. Bromage, 83 Conn. 27, 74 Atl. 1070, 27 L. R. A. (N. S.) 209, 19 Ann. Cas. 796; Hollingsworth v. Howard, 113 Ga. 1099, 39 S. E. 465; Kirby v. President, etc., of Delaware & H. Canal Co., 90 Hun, 588, 35 N. Y. Supp. 975. But in Pennsylvania it has been held that, where a joint tort is alleged, it must be proved joint. Goodman v. Coal Tp., 206 Pa. 621, 56 Atl. 65; Wiest v. Electric Traction Co., 200 Pa. 148, 49 Atl. 891, 58 L. R. A. 666.

been sustained, not how it should be paid.²⁰¹ If different amounts are assessed, plaintiff may take judgment against all *de melioribus damnis*.²⁰² While punitive damages may be included in a single verdict against several joint wrongdoers where all are shown to have been actuated by malice, this will not be permitted where some of the defendants are only liable for compensatory damages.²⁰³ If plaintiff has exercised his right to bring separate suits and has recovered judgments, though he may elect which he will enforce,²⁰⁴ yet, as he can receive only a single compensation, the satisfaction of one will discharge the others, except as to the costs, which he may collect by separate executions.²⁰⁵ But the satisfaction must be entire. If partial, a suit against a co-tort-feasor will not be barred.²⁰⁶

Now, assuming that one joint tort-feasor has been forced to pay, the question arises whether he may obtain contribution or complete indemnity from the others. Subject to the limitations hereafter stated, it is the settled policy of the law to attempt no adjustment of the equities of wrongdoers. "*In pari delicto potior est conditio defendentis*."²⁰⁷ Neither is in a position to ask the court's assistance to relieve him from a situation which was the result of his own

²⁰¹ *Marriott v. Williams*, 152 Cal. 705, 93 Pac. 875, 125 Am. St. Rep. 87; *Washington Market Co. v. Clagett*, 19 App. Cas. (D. C.) 12; *Halsey v. Woodruff*, 9 Pick. (Mass.) 555; *O'Shea v. Kirker*, 4 Bosw. (N. Y.) 120; *Id.*, 8 Abb. Prac. (N. Y.) 69.

²⁰² *Halsey v. Woodruff*, 9 Pick. (Mass.) 555.

²⁰³ *Krug v. Pitass*, 162 N. Y. 154, 56 N. E. 526, 76 Am. St. Rep. 317; *Hoxsle v. Nodine*, 123 Fed. 379, 61 C. C. A. 223. Contra, *Reizenstein v. Clark*, 104 Iowa, 287, 73 N. W. 588.

²⁰⁴ *Elliott v. Hayden*, 104 Mass. 180; *Livingston v. Bishop*, 1 Johns. (N. Y.) 290, 3 Am. Dec. 330. A contrary doctrine appears to be established in England. *Brown v. Wooton*, Cro. Jac. 73, Yelv. 67; *Brinsmead v. Harrison*, L. R. 6 C. P. 584.

²⁰⁵ *Ayer v. Ashmead*, 31 Conn. 447, 83 Am. Rep. 154; *First Nat. Bank of Indianapolis v. Indianapolis Piano Mfg. Co.*, 45 Ind. 5. And see *Lord v. Tiffany*, 98 N. Y. 412, 50 Am. Rep. 689.

²⁰⁶ *Boyles v. Knight*, 123 Ala. 289, 26 South. 939; *McVey v. Manatt*, 80 Iowa, 132, 45 N. W. 548.

²⁰⁷ "Where the parties are in equal fault, the condition of the defendant is the better."

wrongdoing.²⁰⁸ But the maxim implies a consciousness of wrongdoing on the part of the individual against whom it is invoked. He must actually or presumably have been aware that the act was unlawful. Exceptions therefore obtain in two instances: First, where the party seeking indemnity or contribution has not been guilty of any fault, except technically or constructively; second, where both parties have been in fault, but not in the same fault, towards the party injured, and the fault of him against whom relief is sought was the primary and efficient cause of the injury.²⁰⁹

An example of the first is found where one of two innocent masters is compelled to pay damages by reason of a servant's negligence. He may have contribution from the other, and both may recover indemnity of the servant.²¹⁰ So contribution may be obtained where two creditors, acting together, have attached goods sold by their debtor to another, in the honest belief that the sale was void.²¹¹ Further illustrations will be found in the note.²¹²

An example of the second class is where recovery has been had against a municipality for an obstruction to the highway caused by a private person. "The fault of the lat-

²⁰⁸ *Churchill v. Holt*, 131 Mass. 67, 41 Am. Rep. 191; *Andrews v. Murray*, 33 Barb. (N. Y.) 354; *Boyer v. Bolender*, 129 Pa. 324, 18 Atl. 127, 15 Am. St. Rep. 723; *Union Stockyards Co. v. Chicago, B. & Q. R. Co.*, 196 U. S. 217, 25 Sup. Ct. 226, 49 L. Ed. 453, 2 Ann. Cas. 525; *Merryweather v. Nixan*, 8 T. R. 186, 101 Eng. Repr. 1337.

²⁰⁹ *TRUSTEES OF GENEVA v. BRUSH ELECTRIC CO.*, 50 Hun, 581, 584, 3 N. Y. Supp. 595, Chapin Cas. Torts, 119.

²¹⁰ *Nashua Iron & Steel Co. v. Worcester & N. R. Co.*, 62 N. H. 159, 160. To the same effect, *Smith v. Foran*, 43 Conn. 244, 21 Am. Rep. 647; *Georgia S. & F. Ry. Co. v. Jossey*, 105 Ga. 271, 31 S. E. 179.

²¹¹ *Vandiver v. Pollak*, 97 Ala. 467, 12 South. 473, 19 L. R. A. 628; *Farwell v. Becker*, 129 Ill. 261, 21 N. E. 792, 6 L. R. A. 400, 16 Am. St. Rep. 267.

²¹² *Moore v. Appleton*, 26 Ala. 633; *Jacobs v. Pollard*, 10 Cush. (Mass.) 287, 57 Am. Dec. 105; *Ankeny v. Moffett*, 37 Minn. 109, 33 N. W. 320; *Oceanic Steam Nav. Co., Limited, v. Compania Transatlantica Espanola*, 134 N. Y. 461, 31 N. E. 987, 30 Am. St. Rep. 685; *Armstrong County v. Clarion County*, 66 Pa. 218, 5 Am. Rep. 368; *Culmer v. Wilson*, 13 Utah, 129, 44 Pac. 833, 57 Am. St. Rep. 713.

ter is the creation of the nuisance; that of the former, the failure to remove it in the exercise of its duty to care for the safe condition of the public streets. The first was a positive tort, and the efficient cause of the injury complained of; the latter the negative tort of neglect to act upon notice, express or implied." ²¹⁸

²¹⁸ TRUSTEES OF GENEVA v. BRUSH ELECTRIC CO., 50 Hun, 581, 585, 3 N. Y. Supp. 595, Chapin Cas. Torts, 119, per Dwight, J. To the same effect, Waterbury v. Waterbury Traction Co., 74 Conn. 152, 50 Atl. 3; Chesapeake & O. Canal Co. v. Allegany County Com'rs, 57 Md. 201, 40 Am. Rep. 430; Inhabitants of Lowell v. Boston & L. R. Corp., 23 Pick. (Mass.) 24, 34 Am. Dec. 33; Trustees of Village of Canandaigua v. Foster, 81 Hun, 147, 30 N. Y. Supp. 686, affirmed on other grounds 156 N. Y. 354, 50 N. E. 971, 41 L. R. A. 554, 66 Am. St. Rep. 575.

CHAPTER VII

GENERAL PRINCIPLES (CONCLUDED)—CONFLICT OF LAWS

- 59. Local and Transitory Torts Distinguished.
- 60. Transitory Torts—Governing Rules.

TORTS GENERALLY TRANSITORY—LOCAL TORTS

59. Redress is in general not confined to the courts of the state in which the cause arose, though there are a few exceptions where the action is regarded as purely local.

Redress is usually sought in the courts of the very state in which the wrong was committed. The injured party may, however, desire to bring his action elsewhere, and when he will be permitted to do so and under what limitations are now to be considered.

Local and Transitory Actions

At the outset, a division must be made into local and transitory actions. In the former, the action could have arisen in one place only and redress must be sought there, and there alone. The latter is founded upon a transaction which might have taken place anywhere and, subject to exceptions hereafter laid down, recovery may be had in a foreign tribunal.¹ Actions for trespass or other injuries to real property,² including such torts as waste,³ the ob-

¹ "The distinction taken is that actions are deemed transitory where the transaction on which they are founded might have taken place anywhere, but are local where their cause is in its nature necessarily local." *Livingston v. Jefferson*, 1 Brock. 203, 209, Fed. Cas. No. 8,411, per Marshall, C. J.

² *Allin v. Connecticut River Lumber Co.*, 150 Mass. 560, 23 N. E. 581, 6 L. R. A. 416; *Dodge v. Colby*, 108 N. Y. 445, 15 N. E. 703; *Niles v. Howe*, 57 Vt. 388; *Bettys v. Milwaukee & St. P. R. Co.*, 37

³ *Cragin v. Lovell*, 88 N. Y. 258.

struction of highways,⁴ the diversion of water courses,⁵ and the flooding of lands⁶ are necessarily local. Nor does there seem, on principle, to be any distinction between legal and equitable forms of action, since a court of equity, acting *in personam*, can compel only the doing of an act within its own jurisdiction.⁷ On the other hand, assault and battery,⁸ false imprisonment,⁹ and other injuries to the person,¹⁰ libel and slander,¹¹ malicious prosecution,¹² conversion,¹³ and trespass and injuries to personal property¹⁴ are transitory in their character.

Wis. 323; *British South Africa Co. v. Companhia de Mocambique* (1893) A. C. 602, 63 L. J. Q. B. 70, 69 L. T. Rep. (N. S.) 604. *Contra*, *Little v. Chicago, St. P., M. & O. R. Co.*, 65 Minn. 48, 67 N. W. 846, 33 L. R. A. 423, 60 Am. St. Rep. 421. Code Civ. Proc. N. Y. § 982a, provides that "an action may be maintained in the courts of this state to recover damages for injuries to real estate situate without the state * * * whenever such an action could be maintained in relation to personal property without the state."

⁴ *Crook v. Pitcher*, 61 Md. 510.

⁵ *Watts' Adm'rs v. Kinney*, 23 Wend. (N. Y.) 484, affirmed 6 Hill, 82.

⁶ *Eachus v. Trustees of Illinois & M. Canal*, 17 Ill. 534.

⁷ Thus an action in equity to procure an injunction restraining prospective injuries to real property is local. *Ophir Silver Mining Co. v. Superior Court of City and County of San Francisco*, 147 Cal. 467, 82 Pac. 70, 3 Ann. Cas. 340; *Leland v. Hathorn*, 42 N. Y. 547; *Northern Indiana R. Co. v. Michigan Cent. R. Co.* 15 How. 233, 14 L. Ed. 674.

⁸ *Pullman Palace Car Co. v. Lawrence*, 74 Miss. 782, 22 South. 53; *Smith v. Bull*, 17 Wend. (N. Y.) 323; *Mostyn v. Fabrigas*, Cowp. 161, 98 Eng. Repr. 1021.

⁹ *Henry v. Sargeant*, 13 N. H. 321, 40 Am. Dec. 146; *Rafael v. Verelest*, W. Bl. 1055, 96 Eng. Repr. 621.

¹⁰ *Roberts v. Dunsmuir*, 75 Cal. 203, 16 Pac. 782; *Ackerson v. Erie Ry. Co.*, 31 N. J. Law, 309; *Engartner v. Illinois Steel Co.*, 94 Wis. 70, 68 N. W. 664, 34 L. R. A. 503, 59 Am. St. Rep. 859.

¹¹ *Crashley v. Press Pub. Co.*, 179 N. Y. 27, 71 N. E. 258, 1 Ann. Cas. 196; *Lister v. Wright*, 2 Hill (N. Y.) 320; *Machado v. Fontes* (1897) 2 Q. B. 231, 66 L. J. Q. B. 542, 76 L. T. Rep. (N. S.) 588, 45 Wkly. Rep. 565.

¹² *Shaver v. White*, 6 Munf. (Va.) 110, 8 Am. Dec. 730.

¹³ *Whidden v. Seelye*, 40 Me. 247, 63 Am. Dec. 661; *Tyson v. McGuineas*, 25 Wis. 656.

¹⁴ *Mason v. Warner*, 31 Mo. 508; *Laird v. Connecticut & P. R. R. Co.*, 62 N. H. 254, 13 Am. St. Rep. 564; *Hale v. Lawrence*, 21 N. J.

It has been said that the test is to be found in the subject of the injury, as differing from the means whereby and the mere place at which the injury was inflicted. If such subject be real estate or an easement, as a right of way, obviously the action must be local. On the other hand, if it be an individual, then an injury to his person, or if it be personal property, an injury to the property right, no matter by what means occasioned or where inflicted, is essentially transitory, since the subject has not a fixed, stationary, immovable location. To illustrate: Defendant obstructs a highway. If the action involves the plaintiff's right of user, so that such asserted right becomes the subject of the injury, then the cause of action would be local. But suppose plaintiff has fallen over the obstruction and received injuries, for which he seeks damages. There being no issue here as to his right of user, the cause is not removed from the transitory class merely because the injury was received on a highway through the instrumentality of an obstruction.¹⁵

Again, trespass to land being local, but conversion transitory, some difficulty has been experienced where there has been an unlawful severance and appropriation of timber, ore, products of the soil, or the soil itself. The answer must here depend upon the construction to be placed upon the pleadings. Is the gravamen of the action the injury to the realty, or does the plaintiff seek the value of what was removed from the land? Thus in *Ellenwood v. Marietta Chair Co.*¹⁶ it was held by the Supreme Court of the United States that the Circuit Court of Ohio had no jurisdiction of an action for damages for cutting timber from lands in West Virginia, upon the theory that the principal ground of the action was the trespass to the land, the alleged value of the timber being a mere incident.¹⁷ Upon

Law, 714, 47 Am. Dec. 190; *McKenna v. Flisk*, 1 How. (U. S.) 241, 11 L. Ed. 117.

¹⁵ *Gunther v. Dranbauer*, 86 Md. 1, 38 Atl. 33.

¹⁶ *ELLENWOOD v. MARIETTA CHAIR CO.*, 158 U. S. 105, 15 Sup. Ct. 771, 39 L. Ed. 913, Chapin Cas. Torts, 122.

¹⁷ To the same effect, *Ophir Silver Mining Co. v. Superior Court of*

this ground it was distinguished in the later case of *Stone v. U. S.*,¹⁸ where it was held that an action could be maintained in the courts of the state of Washington for the value of timber cut by a trespasser from public lands in Idaho, since the gravamen of the action was here the conversion of the timber after its severance from the land.¹⁹ Where the severance has been accomplished by a third party, the action for a subsequent conversion by defendant is, of course, transitory.²⁰

Suppose an act is done which causes injury to real property situated in an adjoining state, as where an explosion damages a building across the border. As the subject of the injury is realty, it would seem that, under the test already laid down, the action can be brought only in the state where the land is situated. But here some courts have ingrafted an exception upon the general rule, and have laid down what may seemingly be regarded as an arbitrary doctrine, analogous to that of the criminal law, namely, that suit may be brought in either jurisdiction.²¹

City and County of San Francisco, 147 Cal. 467, 82 Pac. 70, 3 Ann. Cas. 340; *American Union Tel. Co. v. Middleton*, 80 N. Y. 408.

¹⁸ 167 U. S. 178, 17 Sup. Ct. 778, 42 L. Ed. 127.

¹⁹ To the same effect, *McGonigle v. Atchison*, 33 Kan. 726, 7 Pac. 550; *Whidden v. Seelye*, 40 Me. 247, 63 Am. Dec. 661; *Radway v. Duffy*, 79 App. Div. 116, 80 N. Y. Supp. 334; *Tyson v. McGuineas*, 25 Wis. 656.

²⁰ *Makely v. A. Boothe Co.*, 129 N. C. 11, 39 S. E. 582.

²¹ *Smith v. Southern R. Co.*, 136 Ky. 162, 123 S. W. 678, 26 L. R. A. (N. S.) 927; *Mannville Co. v. City of Worcester*, 138 Mass. 89, 52 Am. Rep. 261; *Armendiaz v. Stillman*, 54 Tex. 623; *Stillman v. White Rock Mfg. Co.*, 23 Fed. Cas. No. 13,446, 3 Woodb. & M. 539.

TRANSITORY TORTS—GOVERNING RULES

60. If a wrong committed in state A is transitory, and suit has been brought in state B, four different situations may arise. It may be found that for an act or omission of such a character when occurring within its own territorial limits and tested by its own laws—

- (1) Neither state would give redress.**
- (2) Both states would give redress.**
- (3) State A would give redress, but not state B.**
- (4) State B would give redress, but not state A.**

The first case requires no discussion. Of the second it may be observed that a difference in the remedy will not preclude recovery. Thus, where a cause of action has been created by statute in both states, e. g., for death caused by wrongful act or neglect, it is not required that the two statutes be identical in their terms or precisely alike, but it is enough if they are of similar import and character, founded upon the same principle, and possessing the same general attributes.²² Though redress can ordinarily be obtained only in accordance with the procedure of the forum,²³ which will determine the form of action,²⁴ the conduct of the trial, and the rules applicable to the admission and weight of evidence,²⁵ and, so at least one court has held, the amount of the recovery,²⁶ yet in the case of statutory torts the party aggrieved cannot take the benefit of the act without the lim-

²² *Leonard v. Columbla Steam Navigation Co.*, 84 N. Y. 48, 38 Am. Rep. 491. Aliter, where they are dissimilar, *Slater v. Mexican Nat. R. Co.*, 194 U. S. 120, 24 Sup. Ct. 581, 48 L. Ed. 900.

²³ *Mexican Cent. Ry. Co. v. Gehr*, 66 Ill. App. 173.

²⁴ Whether trespass or case. *Henry v. Sargeant*, 13 N. H. 321, 40 Am. Dec. 146.

²⁵ *Johnson v. Chicago & N. W. Ry. Co.*, 91 Iowa, 248, 59 N. W. 66; *Hoadley v. Northern Transp. Co.*, 115 Mass. 304, 15 Am. Rep. 106; *Eingartner v. Illinois Steel Co.*, 94 Wis. 70, 68 N. W. 664, 34 L. R. A. 503, 59 Am. St. Rep. 859.

²⁶ *Dorr Cattle Co. v. Des Moines Nat. Bank*, 127 Iowa, 153, 98 N. W. 918, 102 N. W. 836, 4 Ann. Cas. 519. Contra, *Pullman Palace Car*

itations which the Legislature has seen fit to impose upon the right which it has created. Thus, where the statute of the state where the death occurred gives a cause of action to the widow as such, whereas by the law of the forum suit must be instituted by the administratrix of the deceased, or *vice versa*, the former will govern,²⁷ and a similar principle applies to the *quantum*²⁸ and distribution of the damages,²⁹ since the law of the place of the act must determine, not only the existence and extent of the obligation, but also the corresponding right. For the same reason, while the period of limitations is generally regarded as pertaining solely to the remedy, and as such is to be determined by the *lex fori*,³⁰ yet it is otherwise where the creative statute

Co. v. Lawrence, 74 Miss. 782, 22 South. 53. And see Wharton on Conflict of Laws (3d Ed.) p. 1108.

²⁷ Western & A. R. Co. v. Strong, 52 Ga. 461; Wooden v. Western New York & P. R. Co., 126 N. Y. 10, 26 N. E. 1050, 13 L. R. A. 458, 22 Am. St. Rep. 803; Usher v. West Jersey R. Co., 126 Pa. 206, 17 Atl. 597, 4 L. R. A. 261, 12 Am. St. Rep. 863; Boston & M. R. Co. v. McDuffey, 79 Fed. 934, 25 C. C. A. 247.

²⁸ Louisville & N. R. Co. v. Graham's Adm'r, 98 Ky. 688, 34 S. W. 229, 17 Ky. Law Rep. 1229; Powell v. Great Northern R. Co., 102 Minn. 448, 113 N. W. 1017; Slater v. Mexican Nat. R. Co., 194 U. S. 120, 24 Sup. Ct. 581, 48 L. Ed. 900. Contra (semble) Wooden v. Western New York & P. R. Co., 126 N. Y. 10, 26 N. E. 1050, 13 L. R. A. 458, 22 Am. St. Rep. 803. Here defendant was a New York corporation, and, while the point was not decided, it was observed that "the same reasoning which would expose such a [foreign] corporation to the law of its own jurisdiction would serve equally to justify the right of the domestic corporation to be protected by the remedial limitations of its jurisdiction." But see Kiefer v. Grand Trunk R. Co., 12 App. Div. 28, 42 N. Y. Supp. 171, affirmed 153 N. Y. 688, 48 N. E. 1105, holding that section 1904, Code Civ. Proc., providing for the recovery of interest upon the damages awarded, was not applicable where the death occurred in Canada, there being no such provision in the Canadian statute.

²⁹ In re Coe, 130 Iowa, 307, 106 N. W. 743, 4 L. R. A. (N. S.) 814, 114 Am. St. Rep. 416, 8 Ann. Cas. 148; Dennick v. Central R. Co. of New Jersey, 103 U. S. 11, 26 L. Ed. 439.

³⁰ O'Shields v. Georgia Pac. Ry. Co., 83 Ga. 621, 10 S. E. 268, 6 L. R. A. 152; Arp v. Allis-Chalmers Co., 130 Wis. 454, 110 N. W. 386, 8 L. R. A. (N. S.) 997, 118 Am. St. Rep. 1036; Munos v. Southern Pac. R. Co., 51 Fed. 188, 2 C. C. A. 163. And see Michigan Ins. Bank v. Eldred, 130 U. S. 693, 9 Sup. Ct. 690, 32 L. Ed. 1080.

makes the commencement of a suit within a prescribed time a condition upon which the existence of a cause of action shall depend,⁸¹ or, whether the tort be of statutory or common-law origin, the act can be construed not merely as a declaration that stale claims should not be enforced, but as a positive extinguishment of the invaded right.⁸²

Two exceptions should here be noted to the doctrine that, where the action is transitory, redress is not confined to the place where the wrong occurred. The first covers causes based upon penal statutes. The latter are designed to impose a punishment for an offense against the state, and cannot be given extra-territorial effect. Now, a statute is none the less penal in character because it may provide a money penalty rather than imprisonment, or because the action may be brought by a private person, or because the penalty is to be paid either in whole or in part to a given individual rather than to the state. It is the effect and not the form that is to be considered.⁸³ Is the offender mulcted as a punishment for his disobedience? If so, the statute is penal. Is he required to make compensation to the injured party for the loss sustained? If so, it is remedial. To illustrate: A statute of state X provides that the relatives of one killed by the wrongful act or neglect of another may recover from the latter \$5,000, irrespective of the damages they may have sustained. This is penal.⁸⁴ A statute of

⁸¹ E. g., death due to negligence or wrongful act. *Negaubauer v. Great Northern Ry. Co.*, 92 Minn. 184, 99 N. W. 620, 104 Am. St. Rep. 674, 2 Ann. Cas. 150; *The Harrisburg*, 119 U. S. 199, 7 Sup. Ct. 140, 30 L. Ed. 358; *International Nav. Co. v. Lindstrom*, 123 Fed. 475, 60 C. C. A. 649; *Boyd v. Clark* (C. C.) 8 Fed. 849.

⁸² As where hostile possession of property for the specified period operates to vest title in the possessor. *Howell v. Hair*, 15 Ala. 194; *Fears v. Sykes*, 35 Miss. 633; *Waters v. Barton*, 1 Cold. (Tenn.) 450. And see *Pitt v. Dacre*, L. R. 3 Ch. Div. 295, 45 L. J. Ch. (N. S.) 796, 24 Wkly. Rep. 943; *Beckford v. Wade*, 17 Ves. Jr. 87, 11 Rev. Rep. 20.

⁸³ *Diversey v. Smith*, 103 Ill. 378, 42 Am. Rep. 14.

⁸⁴ *Ralsor v. Chicago & A. Ry. Co.*, 215 Ill. 47, 74 N. E. 69, 106 Am. St. Rep. 153, 2 Ann. Cas. 802; *Casey v. St. Louis Transit Co.*, 116 Mo. App. 235, 91 S. W. 419; *O'Reilly v. New York & N. E. R. Co.*, 16 R. I. 388, 17 Atl. 171, 906, 19 Atl. 244, 5 L. R. A. 364, 6 L. R. A. 719; *Adams v. Fitchburg R. Co.*, 67 Vt. 76, 30 Atl. 687, 48 Am. St.

state Y gives a cause of action to the relatives, but measures the recovery by the loss sustained. This is remedial,³⁵ even though recovery cannot be had beyond a specified amount.³⁶ So, too, a statute is penal which allows double damages where cattle are killed by a railroad,³⁷ or treble damages for unfair discrimination by a common carrier,³⁸ or fifty dollars in addition to actual damages where a telegram is negligently delayed.³⁹ A statute may even come within both classes, as if it permits the loser to recover money lost at gaming, should he sue within a given time, and, where he has failed to do so, allows any third party to sue for three times the amount. This is remedial as to the loser, but penal as to the third party.⁴⁰

The second exception is found where neither party is a resident of the state where the suit is brought and the cause of action did not arise there. Here, while jurisdiction is conceded, assuming that the parties are regularly before the court, it has been held in New York, at least, that it will not be exercised, unless under special circumstances.⁴¹ The weight of authority, however, is against this view, and

Rep. 800; *Marshall v. Wabash R. Co.* (C. C.) 46 Fed. 269. Contra, *Boston & M. R. Co. v. Hurd*, 108 Fed. 116, 47 C. C. A. 615, 56 L. R. A. 193.

³⁵ *Burns v. Grand Rapids & I. R. Co.*, 113 Ind. 169, 15 N. E. 230; *Stewart v. Baltimore & O. R. Co.*, 168 U. S. 445, 18 Sup. Ct. 105, 42 L. Ed. 537.

³⁶ *Nelson v. Chesapeake & O. R. Co.*, 88 Va. 971, 14 S. E. 838, 15 L. R. A. 583.

³⁷ *Bettys v. Milwaukee & St. P. Ry. Co.*, 37 Wis. 323.

³⁸ *Langdon v. New York, L. E. & W. R. Co.*, 58 Hun, 122, 11 N. Y. Supp. 514.

³⁹ *Taylor, Farr & Co. v. Western Union Tel. Co.*, 95 Iowa, 740, 64 N. W. 660.

⁴⁰ *Cole v. Groves*, 134 Mass. 471.

⁴¹ *Gardner v. Thomas*, 14 Johns. (N. Y.) 134, 7 Am. Dec. 445; *Collard v. Beach*, 81 App. Div. 582, 81 N. Y. Supp. 619; *Ferguson v. Nellson*, 58 Hun, 604, 11 N. Y. Supp. 524. And see *Robinson v. Oceanic Steam Nav. Co.*, 112 N. Y. 315, 19 N. E. 625, 2 L. R. A. 636. Though the court may refuse to entertain the action or may dismiss on its own motion yet the laches of defendant may operate as a waiver of his right to insist upon the objection. *Burdick v. Freeman*, 120 N. Y. 420, 24 N. E. 949. And see *Morrisette v. Canadian Pac. R. Co.*, 76 Vt. 267, 56 Atl. 1102.

indeed "on the whole" it appears "consonant to natural right and justice that the courts of every civilized country should be open to hear the causes of all," though the parties are only temporarily within the limits of the jurisdiction.⁴²

Acts Wrongful by Lex Loci, But Not by Lex Fori

The English courts have laid down the rule that redress will not be given unless the injury was of such a character that it would have been actionable if suffered in England.⁴³ Thus cognizance was not taken of a liability created by the law of Belgium for a collision occurring in that country, caused by the act of a pilot whom the shipowner was compelled to employ, since by English law the pilot was not regarded as the servant of the owner.⁴⁴

A more liberal view has been generally adopted in America, where it has frequently been asserted that a right of action arising under the law of one state will be enforced in another, though the latter would not permit recovery, had

⁴² *Roberts v. Knights*, 7 Allen (Mass.) 449, 452; *Pullman Palace Car Co. v. Lawrence*, 74 Miss. 782, 22 South. 53; (semble) *Knight v. West Jersey R. Co.*, 108 Pa. 250, 56 Am. Rep. 200; *Eingartner v. Illinois Steel Co.*, 94 Wis. 70, 68 N. W. 664, 34 L. R. A. 503, 59 Am. St. Rep. 859. For admiralty rule, see *Panama R. Co. v. Napler Shipping Co.*, 166 U. S. 280, 17 Sup. Ct. 572, 41 L. Ed. 1004, where it was said: "Had both parties to the libel been foreigners, it might have been within the discretion of the court to decline jurisdiction of the case, though the better opinion is that, even under those circumstances, the court will take cognizance of torts to which both parties are foreigners, at least in the absence of a protest from a foreign consul." *The Belgenland*, 114 U. S. 355, 5 Sup. Ct. 860, 29 L. Ed. 152.

⁴³ *Carr v. Times*, [1902] A. C. 176, 71 L. J. K. B. 361, 85 L. T. Rep. (N. S.) 144, 17 T. L. R. 657, 50 Wkly. Rep. 257; *Chartered Mercantile Bank v. Netherlands India Steam Nav. Co.*, 10 Q. B. D. 521, 536, 5 Aspin. 65, 47 J. P. 260, 52 L. J. Q. B. 220, 48 L. T. Rep. (N. S.) 546, 31 Wkly. Rep. 445; *Phillips v. Eyre*, L. R. 6 Q. B. 1, 10 B. & S. 1004, 40 L. J. Q. B. 28, 22 L. T. Rep. (N. S.) 869; *The M. Moxham*, 1 P. D. 107, 46 L. J. P. D. & Adm. 17, 34 L. T. Rep. (N. S.) 559, 24 Wkly. Rep. 650.

⁴⁴ *The Halley*, L. R. 2 P. C. 193, 37 L. J. Adm. 33, 18 L. T. Rep. (N. S.) 879, 5 Moore P. C. (N. S.) 263, 16 Wkly. Rep. 998, 16 Eng. Repr. 514.

the cause arisen there, with an exception, rather vaguely worded, in cases where the recognition of such a right would be contrary to the policy of the forum.⁴⁵ What would amount to a difference in policy cannot be determined by any satisfactory test. It should certainly be fundamental,⁴⁶ for even a considerable variance between the statutory or common law of the two states would not warrant a refusal to exercise jurisdiction.⁴⁷ Contrasted with the English doctrine, the prevailing American view seems a fairer application of the principle of comity. It is submitted that the limitation apparently adopted by a few of the courts that an action for injuries causing death is not maintainable, unless there is a substantially similar statute in the state where the action is brought,⁴⁸ is unsound.

Acts Wrongful by Lex Fori, But Not by Lex Loci

It has been well said that "if the acts of the parties impose no obligations on the one hand, and confer no rights

⁴⁵ "Against good morals, or natural justice, or * * * prejudicial to the general interests of our own citizens." *Chicago & E. I. R. Co. v. Rouse*, 178 Ill. 132, 52 N. E. 951, 44 L. R. A. 410; *Rick v. Saginaw Bay Towing Co.*, 132 Mich. 237, 93 N. W. 632, 102 Am. St. Rep. 422; *Powell v. Great Northern R. Co.*, 102 Minn. 448, 113 N. W. 1017; *Northern Pac. R. Co. v. Babcock*, 154 U. S. 190, 14 Sup. Ct. 978, 38 L. Ed. 958. "Contrary to the known policy or prejudicial to the interests of the state in which the suit is brought." *Nelson v. Chesapeake & O. R. Co.*, 88 Va. 971, 14 S. E. 838, 15 L. R. A. 583. "Contrary to pure morals or abstract justice, or unless the enforcement would be of an evil example and harmful to its own people, and therefore inconsistent with the dignity of the government whose authority is invoked." *Morrisette v. Canadian Pac. R. Co.*, 76 Vt. 267, 56 Atl. 1102.

⁴⁶ *Walsh v. New York & N. E. R. Co.*, 160 Mass. 571, 36 N. E. 584, 39 Am. St. Rep. 514.

⁴⁷ So held where the states differed as to the fellow servant rule (*Chicago & E. I. R. Co. v. Rouse*, supra; *Rick v. Saginaw Bay Towing Co.*, supra) and the effect of contributory negligence (*Morrisette v. Canadian Pac. R. Co.*, supra).

⁴⁸ *Wooden v. Western New York & P. R. Co.*, 126 N. Y. 10, 26 N. E. 1050, 13 L. R. A. 458, 22 Am. St. Rep. 803; *Cincinnati, H. & D. R. Co. v. McMullen*, 117 Ind. 439, 20 N. E. 287, 10 Am. St. Rep. 67; *O'Reilly v. New York & N. E. R. Co.*, 16 R. I. 388, 17 Atl. 171, 906, 19 Atl. 244, 5 L. R. A. 364, 6 L. R. A. 719; *Knight v. West Jersey R. Co.*, 108 Pa. 250, 56 Am. Rep. 200.

on the other, where they occur, no good reason is apparent why they should spring into active existence the moment the parties pass into another jurisdiction, where, if they had occurred therein, such relative rights and obligations would have resulted. An act should be judged by the law of the jurisdiction where it was committed; the party acting or omitting to act must be presumed to have been guided by the law in force at the time and place, and to which he owed obedience; if his conduct according to that law violated no right of another, no cause of action arose, for actions at law are provided to redress violated rights.”⁴⁹ It is therefore thoroughly established that the act or omission must have given rise to a cause of action at the place where it occurred,⁵⁰ or, as the English courts have phrased it, must not be “justifiable there.”⁵¹ The significance of this ex-

⁴⁹ *Alexander v. Pennsylvania Co.*, 48 Ohio St. 623, 636, 30 N. E. 69, per Bradbury, J.

⁵⁰ *Louisville & N. R. Co. v. Williams*, 113 Ala. 402, 21 South. 938; *Selma, R. & D. R. Co. v. Lacy*, 43 Ga. 461; *Turner v. St. Clair Tunnel Co.*, 111 Mich. 578, 70 N. W. 146, 36 L. R. A. 134, 66 Am. St. Rep. 397; *State to Use of Allen v. Pittsburgh & C. R. Co.*, 45 Md. 41; *Leonard v. Columbia Steam Nav. Co.*, 84 N. Y. 48, 38 Am. Rep. 491; *McDonald v. Mallory*, 77 N. Y. 546, 33 Am. Rep. 664. An action cannot be maintained in Massachusetts for injuries inflicted by defendant's dog if plaintiff fails to prove scienter as required in New Hampshire the place of occurrence, although in Massachusetts the doctrine of scienter had been abolished by statute. *LE FOREST v. TOLMAN*, 117 Mass. 109, 19 Am. Rep. 400, Chapin Cas. Torts, 123.

⁵¹ “As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England. * * * Secondly, the act must not have been justifiable by the law of the place where it was done.” *Phillips v. Eyre*, L. R. 6 Q. B. 1, 28, 10 B. & S. 1004, 40 L. J. Q. B. 28, 22 L. T. Rep. (N. S.) 869 (quoted in *Carr v. Times* [1902] A. C. 176, 177, 71 L. J. K. B. 361, 85 L. T. Rep. N. S. 144, 17 T. L. R. 657, 50 Wkly. Rep. 257, where it was held that the seizure by a British naval officer of British goods on a British ship in the waters of a foreign sovereign, effected under the authority and by the direction of that sovereign, cannot be made the subject of legal proceedings in England; *Machado v. Fontes*, [1897] 2 Q. B. 231, 233, 66 L. J. Q. B. 542, 76 L. T. Rep. (N. S.) 588, 45 Wkly. Rep. 565, per Willes, J.

pression is shown in *Machado v. Fontes*,⁵² where an action in tort for a libel published in Brazil was sustained in England, although by Brazilian law libel was not a tort, but a crime. "Justifiable," said the court, was to be regarded as synonymous with "innocent." This seems open to serious objection, since it fails to recognize the distinction between purely moral and legal obligations. It is certainly contrary to the recognized rule that the right to recover for a death occurring beyond the limits of the forum is determined and measured by the redress afforded by the law of the place of occurrence,⁵³ and which refuses extra territorial effect to a statute penal in its nature.⁵⁴

Since the question of tort or no tort is therefore to be answered by referring to the *lex loci*, it follows that all defenses which go to the existence or extent of the right or obligation sought to be enforced must be similarly tested. Stepping over a state line cannot give the plaintiff a cause of action, or enlarge the one he already has. Thus in the leading case of *Phillips v. Eyre*⁵⁵ it was held that no recovery could be had in England for acts committed in Jamaica while defendant was its Governor, where such acts had been made lawful and confirmed by a law of the island. So it is a good defense to an action brought in New Hampshire for injuries sustained in Maine while traveling on Sunday that such travel was in violation of a Maine statute.⁵⁶ Further illustrations are given in the note.⁵⁷

⁵² [1897] 2 Q. B. 231, 66 L. J. Q. B. 542, 76 L. T. Rep. (N. S.) 588, 45 Wkly. Rep. 565. In accord, *Scott v. Seymour*, 1 H. & C. 219, 9 Jur. (N. S.) 522, 32 L. J. Exch. 61, 8 L. T. Rep. (N. S.) 511, 11 Wkly. Rep. 169.

⁵³ See Wharton on Conflict of Laws (3d Ed.) 1096. *Machado v. Fontes* would appear an instance of a hard case making bad law. Minor on Conflict of Laws, § 194, note.

⁵⁴ See *Davis v. New York & N. E. R. Co.*, 143 Mass. 301, 9 N. E. 815, 58 Am. Rep. 138.

⁵⁵ L. R. 6 Q. B. 1, 10 B. & S. 1004, 40 L. J. Q. B. 28, 22 L. T. Rep. (N. S.) 869.

⁵⁶ *Beacham v. Proprietors of Portsmouth Bridge*, 68 N. H. 382, 40 Atl. 1066, 73 Am. St. Rep. 607.

⁵⁷ *Baltimore & O. R. Co. v. Reed*, 158 Ind. 25, 62 N. E. 488, 56 L. R. A. 468, 92 Am. St. Rep. 293; *Voshefskey v. Hillside Coal & Iron*

As has already been seen, however, defenses involving questions of procedure and the propriety of assuming jurisdiction are determined by the law of the forum, though even here, where the right is created by statute, a mode of redress may be prescribed by which alone the wrong is to be redressed, thus causing the right to be so conditioned that what is ordinarily matter of form becomes matter of substance, as where actions for death wrongfully caused are directed to be brought by specified individuals and within a given time.

Co., 21 App. Div. 168, 47 N. Y. Supp. 386; Knowlton v. Erie Ry. Co., 19 Ohio St. 260, 2 Am. Rep. 395; Bridger v. Asheville & S. R. Co., 27 S. C. 456, 3 S. E. 860, 13 Am. St. Rep. 653; Railway Co. v. Lewis, 89 Tenn. 235, 14 S. W. 603; Chicago, R. I. & P. Ry. Co. v. Thompson, 100 Tex. 185, 97 S. W. 459, 7 L. R. A. (N. S.) 191, 123 Am. St. Rep. 798.

PART II

SPECIFIC TORTS

CHAPTER VIII

INFRINGEMENT OF PERSONAL SECURITY

- 61. Assault.
- 62. Battery.
- 63. Assault and Battery—Defenses.
- 64. False Imprisonment.
- 65. Defenses.
- 66. Seduction.

ASSAULT

61. "An assault is any attempt or offer with force or violence to do a corporal hurt to another, whether from malice or wantonness, with (under) such circumstances as denote at the time an intention to do it, coupled with a present ability to carry such intention into effect." ¹

This tort constitutes a disturbance of the sense of personal security, an invasion of the right to peace of mind, by causing apprehensions of bodily peril. Being purely mental in its operation, it differs from a battery, where there is a physical injury. Or, put another way, an assault is an inchoate battery—a battery, a consummated assault. In common parlance and in penal statutes, this difference is frequently not observed, and the term "assault" is used to include both.

¹ Tarver v. State, 43 Ala. 354, 356, per Peck, C. J.

"Any Attempt or Offer with Force or Violence to Do a Corporal Hurt"

"There must be some movement towards actual violence,"² such as aiming with a hatchet,³ raising a stick,⁴ presenting a firearm,⁵ shaking one's fist in another's face,⁶ or riding after him, so as to compel him to run for shelter.⁷ Nor need the display of force be so great as in the instances mentioned. Putting a hand on a sword,⁸ clenching a fist, the arm being bent at the elbow, but not drawn back,⁹ and advancing in a threatening manner¹⁰ constitute assaults, though in the last case the advancing party is stopped before he comes within striking distance,¹¹ or the threatened party escapes without injury.¹² But mere words, unaccompanied by any act indicating an intent to carry out an apparent purpose to inflict violence, are insufficient,¹³ and *a fortiori* if uttered over the telephone.¹⁴

² *Cutler v. State*, 59 Ind. 300, 302.

³ *I. De S. and Wife v. W. De S.*, Y. B. Lib. Ass. fol. 99, pl. 60 (1348 or 1349).

⁴ *State v. McAfee*, 107 N. C. 812, 12 S. E. 435, 10 L. R. A. 607.

⁵ *People v. Morehouse*, 6 N. Y. Supp. 763, 25 N. Y. St. Rep. 294; *United States v. Kierman*, 3 Cranch, C. C. 435, Fed. Cas. No. 15,529; *Osborn v. Velitch*, 1 F. & F. 317.

⁶ *Mitchell v. Mitchell*, 45 Minn. 50, 47 N. W. 308.

⁷ *Morton v. Shoppee*, 3 C. & P. 373, 14 E. C. L. 616.

⁸ *TUBERVILLE v. SAVAGE*, 1 Mod. 3, Chapin Cas. Torts, 126, though held no assault, since the accompanying language qualified the act.

⁹ *State v. Hampton*, 63 N. C. 13. Here the accompanying words were, "I have a good mind to strike you." But see *Brown v. State*, 95 Ga. 481, 20 S. E. 495, where defendant picked up a stone, but made no attempt to cast it at one who was about twenty steps distant, and it was held no assault, but merely preparation therefor. To the same effect, *State v. Milsaps*, 82 N. C. 549.

¹⁰ *Read v. Coker*, 13 C. B. 850.

¹¹ *State v. Vannoy*, 65 N. C. 532; *Stephens v. Myers*, 4 C. & P. 349.

¹² *People v. Yslas*, 27 Cal. 630.

¹³ *Penny v. State*, 114 Ga. 77, 39 S. E. 871. Verbal solicitation of a woman for sexual intercourse does not constitute an assault. *State v. White*, 52 Mo. App. 285; *Prince v. Ridge*, 32 Misc. Rep. 686, 66 N. Y. Supp. 454.

¹⁴ *Kramer v. Ricksmeler*, 159 Iowa, 48, 139 N. W. 1091, 45 L. R. A. (N. S.) 928.

Even though there be an act, the latter may be too slight to justify apprehension,¹⁵ and it must indicate an intent to do *bodily* injury.¹⁶

"Whether from Malice or Wantonness"

These words call attention to the distinction, already pointed out,¹⁷ between fright or mental suffering when caused by negligence and when resulting from a willful act.¹⁸ It will be remembered that for the first, when standing alone, many of the courts deny recovery, though if the act be willful a contrary result is reached.¹⁹ Hence plaintiff, if an assault is proved, is at least entitled to nominal damages for the injury to his peace of mind, and in aggravated cases the jury may add exemplary damages.²⁰

Under Circumstances Denoting an Intention and Present Ability to Do Violence

If the accompanying circumstances show that physical hurt is not to be apprehended, there is no assault. While mere words are not of themselves sufficient, the language uttered may be considered for the purpose of explaining

¹⁵ Where the complaint alleged that defendant's conductor had assaulted plaintiff "by grasping her by the arm and shoulders, by winking and smiling at her," held that the winking alone did not constitute an assault. *Birmingham Ry., Light & Power Co. v. Parker*, 161 Ala. 248, 50 South. 55.

¹⁶ Thus no assault is established where a landlord, upon his tenant's refusal to quit, burst open an inner door, removed doors and windows, brought a bloodhound into the house, made a great noise for several days, and refused to permit any food to be furnished to the tenant from the outside. *Stearns v. Sampson*, 59 Me. 568, 8 Am. Rep. 442. Though, where removal was prevented by illness, it might constitute a trespass. *Preisler v. Wielandt*, 48 App. Div. 569, 62 N. Y. Supp. 890.

¹⁷ See *supra*, p. 86.

¹⁸ See note to *Huston v. Freemansburg*, 3 L. R. A. (N. S.) 49, and to *Chittick v. Philadelphia Rapid Transit Co.*, 22 L. R. A. (N. S.) 1073.

¹⁹ *Prince v. Ridge*, 32 Misc. Rep. 666, 66 N. Y. Supp. 454; *Preisler v. Wielandt*, 48 App. Div. 569, 62 N. Y. Supp. 890; *Watson v. Dilts*, 116 Iowa, 249, 89 N. W. 1068, 57 L. R. A. 559, 93 Am. St. Rep. 239; *Wilkinson v. Downton*, [1897] 2 Q. B. 57.

²⁰ *BEACH v. HANCOCK*, 27 N. H. 228, 59 Am. Dec. 373, *Chapin Cas. Torts*, 125.

or qualifying the threatening act. Thus no sense of fear was excited where defendant, though laying his hand on a sword, yet said, "If it were not assize time, I would not take such language,"²¹ or while raising a whip and shaking it said, "Were you not an old man, I would knock you down."²² So the violence must be offered "within such a distance as that harm might ensue if the party was not prevented."²³ Thus a gun or pistol must be presented within shooting distance.²⁴ It is not required, however, that there be an actual ability to inflict violence. It will be sufficient that it be reasonably apparent, since the apprehension of damage may be the same in both cases. Pointing an unloaded firearm at one who does not know it to be unloaded impairs the latter's sense of security quite as much as though the weapon had a cartridge in the breach,²⁵ and although some courts have held this not to be criminal, though admittedly a civil assault,²⁶ the distinction seems questionable. "It is not the secret intent of the assaulting party, nor the undisclosed fact of his ability or inability to commit a battery, that is material, but what his conduct and the attending circumstances denote at the time to the party assaulted."²⁷

²¹ *TUBERVILLE v. SAVAGE*, 1 Mod. 3, 86 Eng. Repr. 684, Chapin Cas. Torts, 126.

²² *State v. Crow*, 23 N. C. 375. To the same effect, *Blake v. Barnard*, 9 C. & P. 626, 38 E. C. L. 365.

²³ *People v. Lilley*, 43 Mich. 521, 525, 5 N. W. 982.

²⁴ *Tarver v. State*, 43 Ala. 354, 356.

²⁵ *BEACH v. HANCOCK*, 27 N. H. 223, 59 Am. Dec. 373, Chapin Cas. Torts, 125.

²⁶ *Chapman v. State*, 78 Ala. 463, 56 Am. Rep. 42; *State v. Godfrey*, 17 Or. 300, 20 Pac. 625, 11 Am. St. Rep. 830.

²⁷ *Commonwealth v. White*, 110 Mass. 407, 409, per Wells, J. To the same effect, *State v. Shepard*, 10 Iowa, 126; *State v. Smith*, 2 Humph. (Tenn.) 457; and see *supra*, p. 6.

BATTERY

62. "Battery is an unlawful touching the person of another by the aggressor himself or any other substance put in motion by him."²⁸

A battery is a consummated assault. Though the force be but slight, the tort may be none the less complete,²⁹ since it may have constituted a gross indignity.³⁰ Still, where the physical impact is very slight, motive may be introduced. Therefore it is no battery to touch another in discourse,³¹ or merely to attract attention,³² or to persuade.³³

The term "person" has received a liberal interpretation, and includes articles which at the time are in reasonably close association with the body itself. Thus, snatching a paper from another's hands is a battery;³⁴ so is striking a horse hitched to a carriage in which plaintiff is riding,³⁵

²⁸ *Kirland v. State*, 43 Ind. 146, 153, 13 Am. Rep. 386, per Buskirk, J.

²⁹ "A battery is committed whenever the violence menaced in an assault is actually done, though in ever so small a degree, upon the person." *Sweeden v. State*, 19 Ark. 205, 213.

³⁰ E. g., spitting in the face. *Alcorn v. Mitchell*, 63 Ill. 553 (verdict for \$1,000 sustained); *Draper v. Baker*, 61 Wis. 450, 21 N. W. 527, 50 Am. Rep. 143 (verdict for \$1,200 sustained).

³¹ *TUBERVILLE v. SAVAGE*, 1 Mod. 3, Chapin Cas. Torts, 126.

³² *Coward v. Baddeley*, 4 H. & N. 478, 5 Jur. (N. S.) 414, 28 L. J. Exch. 260, 7 Wkly. Rep. 466.

³³ *State v. Hemphill*, 162 N. C. 632, 78 S. E. 167, 45 L. R. A. (N. S.) 455. And see *Cole v. Turner*, 6 Mod. 149, where Holt, C. J., said: "First, that the least touching of another in anger is a battery. Secondly, if two or more meet in a narrow passage and without any violence or design of harm, the one touches the other gently it will be no battery. Thirdly, if any of them use violence against the other to force his way in a rude, inordinate manner, it will be a battery; or any struggle about the passage to that degree as may do hurt will be a battery."

³⁴ *Dyk v. De Young*, 35 Ill. App. 138.

³⁵ *Clark v. Downing*, 55 Vt. 259, 45 Am. Rep. 612. And see *De Marentille v. Oliver*, 2 N. J. Law, 379.

driving against a vehicle occupied by plaintiff,³⁶ or striking a rail against which he is leaning.³⁷ Going a step further, it is unnecessary that there should be a physical touching by the aggressor's person, since the wrong may be accomplished by means of an agency put in motion by him, as where an object is thrown at,³⁸ or a liquid poured over, plaintiff,³⁹ or he is run down by a bicycle.⁴⁰ Nor need the effect be coincident with the act, since it is a battery if one delivers to another to be eaten an article which he is aware contains a concealed foreign substance which upon being innocently swallowed causes injury.⁴¹ Deception is here equivalent to force.⁴²

DEFENSES

63. Among the defenses which may be interposed to an assault or battery are—

- (a) Defense of person.
- (b) Defense of property.
- (c) Recaption of property.
- (d) Enforcement of discipline, regulations, and order.

(a) Defense of Person Attacked

Since the loss or damage of the party suffering was deemed the primary subject of consideration, the early common law refused to recognize a plea of self-defense to an action brought by the aggressor.⁴³ For the crime a

³⁶ *Hopper v. Reeve*, 1 Moore, C. P. 407, 7 Taunt. 698, 2 E. C. L. 554.

³⁷ *Kendall v. Drake*, 67 N. H. 592, 30 Atl. 524.

³⁸ *Peterson v. Haffner*, 59 Ind. 130, 26 Am. Rep. 81; *Bullock v. Babcock*, 3 Wend. (N. Y.) 391.

³⁹ *Murdock v. State*, 65 Ala. 520.

⁴⁰ *Mercer v. Corbin*, 117 Ind. 450, 20 N. E. 132, 3 L. R. A. 221, 10 Am. St. Rep. 76. Or by an automobile. *Schneider v. State*, 181 Ind. 218, 104 N. E. 69.

⁴¹ *Com. v. Stratton*, 114 Mass. 303, 19 Am. Rep. 350. Cf. *Carr v. State*, 135 Ind. 1, 34 N. E. 533, 20 L. R. A. 863, 41 Am. St. Rep. 408.

⁴² *Cooley on Torts* (3d Ed.) 284.

⁴³ *Anon.* Y. B. 21 & 22 Edw. I, 586; *Anon.*, Y. B. 12 Edw. II, fol. 381.

pardon might be issued by the king under the statute of Gloucester,⁴⁴ but this did not affect a civil action. Such an absurdity could not endure, and in 1400 we find the right of self-defense admitted.⁴⁵ It is now thoroughly established that a belief which a reasonable man would entertain of impending bodily harm will justify the employment of that degree of force which is apparently required for purposes of protection. Upon analyzing this statement, the following points appear.

First. It is sufficient that there is an actual belief of danger. Its existence need not be shown. If, for instance, one presents a revolver at another under circumstances indicating an intent immediately to shoot, he cannot require the latter, before taking measures to protect himself, to determine at his peril whether the weapon was loaded or unloaded, or whether it was presented in jest or earnest.⁴⁶

Second. The belief must be one which a reasonable man would have entertained under similar circumstances. For, though the defendant must in fact have supposed that the peril existed, the justification for his belief must be tested by the ordinary standard, and not by that of the over-cautious or the over-bold.⁴⁷

Third. The harm must be impending. One cannot wait until the danger has passed, and the necessity for self-defense is over, and then proceed to take revenge.⁴⁸ Nor since force is permitted for purposes of protection, and not for punishment, will the law consider opprobrious words a justification.⁴⁹ Still they should logically be ad-

⁴⁴ 6 Edw. I, ch. 9.

⁴⁵ *Chapleyn of Greye's Inn v. ———*, Y. B. 2 Henry IV, fol. 8, pl. 40.

⁴⁶ See *New Orleans & N. E. R. Co. v. Jopes*, 142 U. S. 18, 12 Sup. Ct. 109, 35 L. Ed. 919.

⁴⁷ *Courvoisier v. Raymond*, 23 Colo. 113, 47 Pac. 284; *Zell v. Dunaway*, 115 Md. 1, 80 Atl. 215; *Beck v. Minneapolis Union Ry. Co.*, 95 Minn. 73, 103 N. W. 746; *Palmer v. Smith*, 147 Wis. 70, 132 N. W. 614.

⁴⁸ *Ogden v. Claycomb*, 52 Ill. 365; *Hetrick v. Crouch*, 141 Mich. 649, 105 N. W. 131.

⁴⁹ *Norris v. Casel*, 90 Ind. 143; *Murray v. Boyne*, 42 Mo. 472;

mitted in evidence as a part of the attendant circumstances for the purpose of affecting damages⁵⁰ exemplary in character, but not to reduce compensatory damages.⁵¹ Nor can threats previously made and not communicated to defendant be considered, since they did not influence his conduct,⁵² though they may be looked to in connection with present demonstrations as grounds of apprehension.⁵³

But the rule that danger must be impending does not require that one should wait until a blow is struck, "for," as was quaintly observed in an early case, "perhaps it will come too late afterwards."⁵⁴ Were it otherwise, "the right of self-defense would be of but little value."⁵⁵ So, where one is attacked by several, he may act with more promptness and resort to more forcible means to protect himself than where assailed by a single person.⁵⁶

Can force be employed if a way of retreat is left open to the party assailed? Here we must differentiate between cases (1) where the aggressor has been killed, and (2) where his injuries have not resulted in death. In the first, a plea of self-defense is not available, where the party assailed could have retreated without increasing his apparent hazard. Under such circumstances, out of regard for human life, the law says that he shall run rather than

Keyes v. Devlin, 3 E. D. Smith (N. Y.) 518. Contra, by statute, in cases of criminal assault, *Brown v. State*, 74 Ala. 42; *Murphy v. State*, 92 Ga. 75, 17 S. E. 845; *Behling v. State*, 110 Ga. 754, 36 S. E. 85.

⁵⁰ *Keyes v. Devlin*, *supra*; *Haman v. Omaha Horse Ry. Co.*, 35 Neb. 74, 52 N. W. 830.

⁵¹ *Donnelly v. Harris*, 41 Ill. 126; *Corcoran v. Harran*, 55 Wis. 120, 12 N. W. 468.

⁵² *Sorgenfrei v. Schroeder*, 75 Ill. 397.

⁵³ See *Rippy v. State*, 2 Head (Tenn.) 217.

⁵⁴ *Chapleyn of Greye's Inn v. —*, Y. B. 2 Hen. IV, fol. 8, pl. 40.

⁵⁵ *State v. McDonald*, 67 Mo. 13, 19. "A person about to be attacked is not bound to wait until his adversary gets the drop on him." *State v. Matthews*, 148 Mo. 185, 193, 49 S. W. 1085, 71 Am. St. Rep. 594.

⁵⁶ *Thorton v. Taylor*, 21 Ky. Law Rep. 1082, 54 S. W. 16; *Higgins v. Minaghan*, 78 Wis. 602, 47 N. W. 941, 11 L. R. A. 138, 23 Am. St. Rep. 428.

slay, or, as it has sometimes been put, shall "retreat to the wall"—and this whether the homicide occurred at the beginning or during the continuance of the affray, since it is the situation at the time of the killing which is to be considered.⁵⁷ But if the party assailed is at the time in his own dwelling, he is under no obligation to retreat further, since he is regarded as already "at the wall."⁵⁸ In the second class of cases—i. e., where injury and not death has resulted—it is generally held that one may stand and repel force with such force as may reasonably seem necessary.⁵⁹

Fourth. The defending party cannot employ a degree of force beyond what is apparently demanded for purposes of protection without rendering himself liable for the excess.⁶⁰ Should he do so, two wrongs will in fact have been committed—one by the assailant in beginning the attack, and the other by the assailed in using excessive force in resisting it.⁶¹ Furthermore, the means employed must be appropriate. To justify the use of deadly weapons, the danger must seemingly be greater than where resort has been had to natural methods of defense.⁶²

⁵⁷ *State v. Jones*, 89 Iowa, 182, 56 N. W. 427; *People v. Constantino*, 153 N. Y. 24, 47 N. E. 37; *State v. Gentry*, 125 N. C. 733, 34 S. E. 706; *Clark v. Com.*, 90 Va. 360, 18 S. E. 440; *State v. Zeigler*, 40 W. Va. 593, 21 S. E. 763. While the foregoing cases give the rule of the criminal law, it is submitted that an identical principle prevails in civil actions. See *THOMASON v. GRAY*, 82 Ala. 291, 293, 3 South. 38, *Chapin Cas. Torts*, 126. How far the obligation to fly exists, or how long it continues before homicide can be regarded as excusable, depends on the suddenness and violence of the attack, the imminence of the danger, and the age, strength, and sex of the parties. *People v. Garretson*, 2 Wheeler, Cr. Cas. (N. Y.) 347.

⁵⁸ *State v. Dixon*, 75 N. C. 275; *State v. Gentry*, 125 N. C. 733, 736, 34 S. E. 706; *State v. Middleham*, 62 Iowa, 150, 17 N. W. 446; *State v. Martin*, 30 Wis. 216, 11 Am. Rep. 567.

⁵⁹ *State v. Sherman*, 16 R. I. 631, 18 Atl. 1040.

⁶⁰ *THOMASON v. GRAY*, 82 Ala. 291, 3 South. 38, *Chapin Cas. Torts*, 126; *Trogden v. Henn*, 85 Ill. 237; *Brown v. Gordon*, 1 Gray (Mass.) 182; *Nichols v. Brabazon*, 94 Wis. 549, 69 N. W. 342.

⁶¹ *Dole v. Erskine*, 35 N. H. 503. But see *Elliott v. Brown*, 2 Wend. (N. Y.) 497, 20 Am. Dec. 644, holding that, if the party as-

⁶² *People v. Rodrigo*, 69 Cal. 601, 11 Pac. 481; *Floyd v. State*, 36 Ga. 91, 91 Am. Dec. 760; *State v. Ferguson*, 26 Mo. App. 8.

Defense of Another

Whatever may have been the early common-law rule,⁶³ it is now thoroughly settled that one may defend, not only himself, but also a member of his family,⁶⁴ a master,⁶⁵ or a servant.⁶⁶ In fact, it would seem permissible to protect any third party, since "one may do for another whatever the other may do for himself—a rule to which, if there are any exceptions, they are few."⁶⁷ It must appear, however, that the party sought to be protected was free from fault,⁶⁸ and the limitations upon the right of self-defense already considered apply here with equal force.

(b) Defense of Property

Force is likewise excusable when employed in defense of property, real or personal. But it must not exceed what is apparently required, under the circumstances, for purposes of protection,⁶⁹ as is shown by the plea which defendant interposes that "he laid his hands gently" upon the

sailed uses excessive force, he loses all right of recovery from his assailant. Cf. *Deagan v. Weeks*, 67 App. Div. 410, 73 N. Y. Supp. 641; *Murphy v. McQuade*, 20 Misc. Rep. 671, 46 N. Y. Supp. 382.

⁶³ See ——— v. *Fakenham*, Y. B. 9 Edw. IV, fol. 48, pl. 4, where it was thought that a battery by a servant in defense of his master was excusable, though the master might not do as much for the servant. But in *Seaman v. Cuppledick*, Owen, 150, the right of defense was considered reciprocal.

⁶⁴ *Sloan v. Pierce*, 74 Kan. 65, 85 Pac. 812; *Flint v. Bruce*, 68 Me. 183; *Comm. v. Malone*, 114 Mass. 295; *Tompkins v. Knut* (C. C.) 94 Fed. 956.

⁶⁵ See ——— v. *Fakenham*, *supra*.

⁶⁶ See *Fortune v. Jones*, 30 Ill. App. 116, reversed on other grounds 128 Ill. 518, 21 N. E. 523.

⁶⁷ *Bishop's New Criminal Law*, § 877; *State v. Totman*, 80 Mo. App. 125. See Penal Law N. Y. (Consol. Laws, c. 40) § 246, subd. 3, declaring the use of or attempt to use force not unlawful "either by the party about to be injured or by another person in his aid or defense in preventing or attempting to prevent an offense against his person, * * * if the force or violence used is not more than sufficient to prevent such offense."

⁶⁸ *Morris v. McClellan*, 154 Ala. 639, 45 South. 641, 16 Ann. Cas. 805.

⁶⁹ *Abt v. Burgheim*, 80 Ill. 92; *HANNABALSON v. SESSIONS*, 116 Iowa, 457, 90 N. W. 93, 93 Am. St. Rep. 250, Chapin Cas. Torts, 180; *O'Donnell v. McIntyre*, 118 N. Y. 156, 23 N. E. 455; *SCRIBNER*

aggressor.⁷⁰ Furthermore, the force must be appropriate to the end designed.⁷¹ This general rule must, however be taken with some modifications. For instance, one in possession of land may remove a trespasser, yet, as a resort to force is not to be encouraged, a distinction is here made between cases of forcible and peaceful entry. It has therefore been said that, "if a person enters another's house with force and violence, the owner of the house may justify turning him out, using no more force than is necessary, without a previous request to depart; but if the person enters quietly, the other party cannot justify turning him out without a previous request to depart."⁷² Again, it has frequently been asserted that the owner of property is not justified in resisting an attack upon his rights to the extent of killing his adversary,⁷³ unless, as already intimated, he is within his own dwelling, when the measures adopted to repel the assailant or to prevent his forcible entry may extend even to the taking of life.⁷⁴ But, while true as a general proposition, it cannot be laid down that the owner is invariably responsible when death ensues. He is, of course, liable if the killing is intentionally done while he is under no apprehension of personal harm, and an intent may be found to exist where he has deliberately made use of

v. BEACH, 4 Denio (N. Y.) 448, 47 Am. Dec. 265, Chapin Cas. Torts, 128; Lichtenwallner v. Laubach, 105 Pa. 366.

⁷⁰ "Molliter manus imposit."

⁷¹ Slapping the face of a trespasser is not a proper method of removing him from the premises. Com. v. Clark, 2 Metc. (Mass.) 23. To the same effect, Hairston v. State, 54 Miss. 689, 28 Am. Rep. 392; Collins v. Renison, Say. 138, 96 Eng. Repr. 830.

⁷² Tullay v. Reed, 1 C. & P. 6, per Park, J. To the same effect, State v. Woodward, 50 N. H. 527.

⁷³ Oliver v. State, 17 Ala. 587; Crawford v. State, 90 Ga. 701, 17 S. E. 628, 35 Am. St. Rep. 242; Davison v. People, 90 Ill. 221; State v. Kennedy, 20 Iowa, 569; State v. McDonald, 49 N. C. 19; State v. Clark, 51 W. Va. 457, 41 S. E. 204.

⁷⁴ Pond v. People, 8 Mich. 150; Smith v. State, 106 Ga. 673, 32 S. E. 851, 71 Am. St. Rep. 286; Hayner v. People, 213 Ill. 142, 72 N. E. 792. So held as to an office, Morgan v. Durfee, 69 Mo. 469, 33 Am. Rep. 508; and a storehouse, Sparks v. Com., 89 Ky. 644, 20 S. W. 167.

a deadly weapon;⁷⁵ but he should not be held accountable where, having resorted only to a means of defense not necessarily deadly in character, and employing only an apparently necessary degree of force, he kills by accident,⁷⁶ nor where the combat has progressed to such a point that he acts, not in defense of property, but of his own life.⁷⁷

It is submitted that the right to use spring guns or traps is to be tested largely by the rules already laid down. The mere act of setting them on one's premises is not unlawful, though if the public are subjected to danger they might constitute a nuisance;⁷⁸ nor does it seem reasonable that the owner should be held liable to an injured trespasser if they were set with the honest purpose of protection from the aggressions of wild animals and in places where the presence of man could not reasonably be anticipated. If placed, however, for the purpose of guarding against trespassers, one of whom is injured, the owner may be held liable, since the force may be excessive and the method of its application improper. What one cannot do directly he cannot do indirectly, and there is no difference between shooting a trespasser by means of a gun held in the hand and causing him unknowingly to shoot himself.⁷⁹

⁷⁵ *Davison v. People*, 90 Ill. 221; *State v. Gilman*, 69 Me. 163, 31 Am. Rep. 257; *State v. Shippey*, 10 Minn. 223 (Gil. 178), 88 Am. Dec. 70; *State v. Forsythe*, 89 Mo. 667, 1 S. W. 834.

⁷⁶ *Bishop's New Crim. Law*, vol. 1, § 861.

⁷⁷ "So it is clear that if one man deliberately kills another to prevent a mere trespass on his property—whether that trespass could or could not be otherwise prevented—he is guilty of murder. If, indeed, he had at first used moderate force, and this had been returned with such violence that his own life was endangered, and then he killed from necessity, it would have been excusable homicide, not because he could take life to save his property, but he might take the life of the assailant to save his own." *State v. Morgan*, 25 N. C. 186, 193, 38 Am. Dec. 714, per Gaston, J.

⁷⁸ *State v. Moore*, 31 Conn. 479, 83 Am. Dec. 159.

⁷⁹ *Simpson v. State*, 59 Ala. 1, 31 Am. Rep. 1; *Hooker v. Miller*, 37 Iowa, 613, 18 Am. Rep. 18; *State v. Marfaudille*, 48 Wash. 117, 92 Pac. 939, 14 L. R. A. (N. S.) 346, 15 Ann. Cas. 584; *Bird v. Holbrook*, 4 Bing. 628, 13 El. O. L. 667.

Recaption

It is well to emphasize the difference between defense of property and recaption. If A. wrongfully attempts to take a chattel from B.'s possession, the latter in resisting the attack is *preventing* the commission of a tort. But if A. succeeds, and B. retakes the chattel, B. has only done for himself what the law would have done for him. Here he is *redressing* a wrong already accomplished.⁸⁰

Now, while a resort to "the strong right arm" is sometimes permitted, it is not to be encouraged. The courts are open to the party aggrieved, and he should seek their aid—not engage in a private war. Still to force the aggrieved party in every case to suffer the delay incident to an action might on occasion work grave injustice. We therefore find that this right may arise where the circumstances are exceptional, though the courts are not fully in accord as to its extent. In Massachusetts, where a liberal view has been taken, it is held that "a man may defend or regain his momentarily interrupted possession by the use of reasonable force short of wounding or the employment of a dangerous weapon."⁸¹ This appears a reasonable doctrine.⁸²

Stress should be laid on the phrase "momentarily inter-

⁸⁰ Logically, recaption should be considered under the head of "redress." It is taken up at this point, as it is thought that this right may be better understood if immediately contrasted with defense of property. This is also true of re-entry.

⁸¹ *COM. v. DONAHUE*, 148 Mass. 529, 531, 20 N. E. 171, 2 L. R. A. 623, 12 Am. St. Rep. 591, Chapin Cas. Torts, 131. In accord, *Heminway v. Heminway*, 58 Conn. 443, 19 Atl. 766.

⁸² Though the language of the learned court is possibly open to the objection that no distinction with regard to the means and the degree of force is apparently made between defense and recaption. The latter right being much more limited, there should be greater strictness. There seems on principle no reason why one should not defend by means of a dangerous weapon, though he may be responsible for its use. But it has been held that resort cannot be had to such a method for purposes of recaption. *State v. Dooley*, 121 Mo. 591, 26 S. W. 558; *State v. Morgan*, 25 N. C. (3 Ired.) 186, 38 Am. Dec. 714. It is submitted that in any event, if the unlawful taker turns upon the owner, the latter, to protect himself, may then exceed the limits prescribed for recaption. Here it becomes a question of self-defense.

rupted possession." Recaption, though essentially a method of redress, is to be recognized only when the circumstances are such that the case was practically one of defense. It will not be sufficient merely that the party assailed was in possession of property belonging to the assailant. True, one may reclaim and retake his goods wherever he finds them, provided he can do so peaceably; but to permit him to use force without regard to the time which may have elapsed after their taking would only encourage violence. It is therefore best to limit it to instances where the taking and recovery are substantially one transaction, or, as it has sometimes been put, to cases of "fresh pursuit." Here the owner is really resisting attack, rather than seeking to regain a possession with which he has previously parted. Authorities will be found in the note.⁸³ It would certainly be absurd to say that he may use force only so long as he retains the article within his grasp, but that if it is snatched from him he must permit the taker peaceably to depart, and although some courts have denied generally that the right of forcible recaption exists,⁸⁴ it would appear doubtful whether the policy of peace at any price would be carried to such an extreme.⁸⁵

The original taking must have been unlawful.⁸⁶ Where the property has been delivered by or with the consent of the owner, no fraud having been practiced, he cannot for-

⁸³ In the following the property had not been removed from the owner's premises: *Winter v. Atkinson*, 92 Ill. App. 162; *Hamilton v. Arnold*, 116 Mich. 684, 75 N. W. 133; *Gyre v. Culver*, 47 Barb. (N. Y.) 592.

In the following recaption was effected at a distance from the place of taking: *State v. Dooley*, 121 Mo. 591, 26 S. W. 558 (distance not given, but force improper); *State v. Elliot*, 11 N. H. 540 (about 100 rods); *Hodgeden v. Hubbard*, 18 Vt. 504, 46 Am. Dec. 167 (two miles).

⁸⁴ *Hendrix v. State*, 50 Ala. 148 (apparently no fresh pursuit); *Bobb v. Bosworth*, Litt. Sel. Cas. (Ky.) 81, 12 Am. Dec. 273 (apparently no fresh pursuit); *Sabre v. Mott* (C. C.) 88 Fed. 780 (possession peaceably acquired).

⁸⁵ See *Harris v. Marco*, 16 S. O. 575.

⁸⁶ *Gates v. Lounsbury*, 20 Johns. (N. Y.) 427; *Bowman v. Brown*, 55 Vt. 184.

cibly regain possession,⁸⁷ if, as one court has said, the taker under an honest, though unjustifiable, claim of right refuses to return,⁸⁸ though this qualification seems open to criticism.⁸⁹ He has been permitted to do so, however, where his consent was fraudulently obtained, since there was really no consent at all,⁹⁰ which would seem fairly to include a case where the article was handed over for the purpose of immediate examination and return.⁹¹ To permit the use of force when the property has come into the possession of a third party, who has received it innocently, would, it is thought, be an unwarrantable extension of the privilege, though in England this appears to be allowed.⁹²

Up to this point, the right of recovery has been discussed only with reference to personal property. Do the same

⁸⁷ *Watson v. Rinderknecht*, 82 Minn. 235, 84 N. W. 798.

⁸⁸ *Kirby v. Foster*, 17 R. I. 437, 22 Atl. 1111, 14 L. R. A. 317.

⁸⁹ It is submitted that consent, once fairly obtained, bars the right of forcible recaption, whether the detaining was prompted by an honest or dishonest motive. By consenting, the owner has himself assisted in bringing about the situation, and, though the courts may aid him, there would seem no reason for allowing him an extrajudicial remedy of a dangerous character, recognized only because of its necessity. How can his right be made to depend on the state of mind of the detainer? On the other hand, if consent is lacking, and there has been fresh pursuit, is recaption from the taker to be refused because the latter may himself believe that he has a right to detain? Cf. *Madden v. Brown*, 8 App. Div. 454, 40 N. Y. Supp. 714, where it was said (8 App. Div. 456, 40 N. Y. Supp. 715): "As to the property which had been feloniously or wrongfully taken from the defendant's possession, he had the right to use sufficient force to retake it from the dwelling of the wrongdoer, provided he entered peaceably, did not commit a breach of the peace, or use unnecessary force. As to the property which had been placed in the plaintiff's possession by the defendant's consent, the latter had the right to take it from the dwelling and was not a trespasser in so doing, provided he entered peaceably, did not use force, or commit a breach of the peace."

⁹⁰ *Anderson v. State*, 6 Baxt. (Tenn.) 608; *Hodgeden v. Hubbard*, 18 Vt. 504, 46 Am. Dec. 167.

⁹¹ *Baldwin v. Hayden*, 6 Conn. 453. And see *Com. v. Lynn*, 123 Mass. 218.

⁹² See *Pollock on Torts* (7th Ed.) 380, note C; *Burdick on Torts* (3d Ed.) 223.

rules apply to land? It is elementary that the true owner, wrongfully held out of possession, "may watch his opportunity, and, if he can regain possession peaceably, may maintain it and lawfully resist an attempt by the former occupant to retake possession."⁹³ By the early common law it would seem that he might use force to regain as well as to retain,⁹⁴ though this is by no means clear.⁹⁵

At all events, any doubts that might have existed were settled by a succession of statutes.⁹⁶ By the pioneer act of 5 Richard II it is declared "that none from henceforth make any entry into any lands and tenements but in case where entry is given by law; and in such case, not with strong hand nor with multitude of people, but only in peaceable and easy manner." This and possibly its successors have become a part of the common law of the states,⁹⁷ though in many of them the subject has been regulated by legislation.⁹⁸ As these statutes differ in terms, it will be impossible to consider forcible entry and detainer at any length.

Though the statute of Richard II created a crime, it was held to create no cause of action in the party dispossessed. If an assault was committed, the action was for assault, and defendant was not excused under a plea of defense of property, since his entry was unlawful. On the other hand, when the cause of action was simply the eviction, no damages could be recovered.⁹⁹ This is not universally true at the present time. In many states "the main object still is to preserve the public peace and prevent parties from asserting their rights by force or violence, though

⁹³ *Bliss v. Johnson*, 73 N. Y. 529, 534.

⁹⁴ *Cooley on Torts* (3d Ed.) 663; *Burdick on Torts* (3d Ed.) 221.

⁹⁵ *Bishop's New Criminal Law*, § 490 et seq.; *Cruiser v. State*, 18 N. J. Law, 206; *State v. Morgan*, 59 N. H. 322.

⁹⁶ 5 Ric. II, c. 8; 15 Ric. II, c. 2; 8 Hen. VI, c. 9; 31 Eliz. c. 11; 21 Jac. I, c. 15. For a review of these statutes, see *Bishop's New Crim. Law*, § 492 et seq.

⁹⁷ *Harding's Case*, 1 Greenl. (1 Me.) 22.

⁹⁸ See *Code Civ. Proc. N. Y.* § 2233; *Penal Law N. Y.* (Consol. Laws, c. 40) § 2034. Note resemblance to statute of Richard II.

⁹⁹ *Beddall v. Maitland*, L. R. 17 Ch. D. 174.

by gradual additions the remedy has become in effect a private as well as a public one."¹⁰⁰ Consequently the forcible entrant will not only be compelled to restore the property and be forced to make compensation for injuries to the person of the occupant, but in addition will be held in damages for the entry itself or the detainer.¹⁰¹

Although an assault or battery may and frequently does occur, it is not necessary that either should be proven. It will be sufficient to make the entry unlawful that there has been such a display of force as is calculated to intimidate or tend to a breach of the peace.¹⁰²

To make out a case of forcible entry, the entrant must have gone upon premises which were in the actual possession of another. As has been seen, a mere trespasser may be removed. He "cannot by the very act of trespass, immediately and without acquiescence, give himself what the law understands by possession against the person whom he ejects, and drive him to produce his title, if he can, without delay, reinstate himself in his former possession."¹⁰³ Hence, actual possession being required, in order that the statute may apply, a master may remove his servant, or a principal his agent, using proper force. "The

¹⁰⁰ Wood v. Phillips, 43 N. Y. 152, 157, per Folger, J.

¹⁰¹ Rimmer v. Blasingame, 94 Cal. 139, 29 Pac. 857; Carlisle v. Callahan, 78 Ga. 320, 2 S. E. 751; Lane v. Ruhl, 103 Mich. 38, 61 N. W. 347; Bach v. New, 23 App. Div. 548, 48 N. Y. Supp. 777 (entry not forcible). Contra, Low v. Elwell, 121 Mass. 309, 23 Am. Rep. 272.

¹⁰² Lewis v. State, 99 Ga. 692, 26 S. E. 496, 59 Am. St. Rep. 255; State v. Davis, 109 N. C. 809, 13 S. E. 883, 14 L. R. A. 206; Milner v. Maclean, 2 C. & P. 17. Defendant, breathing curses and threats of vengeance and death, rushed towards a dwelling in which a number of people were assembled. The latter fled panic stricken, first fastening the door. Defendant "kicked down the door, entered the house, and fell over something, by which his leg was unfortunately broken, instead of his neck." Held to be forcible entry. State v. Jacobs, 94 N. C. 950.

¹⁰³ Brown v. Dawson, 12 Adol. & El. 624, 628, per Lord Denman, C. J. To the same effect, Taylor v. Adams, 58 Mich. 187, 24 N. W. 864. A "scrambling" possession, such as either contestant might gain from time to time in the course of a struggle over unimproved lands, cannot be made the basis of an action of forcible entry. Voll v. Butler, 49 Cal. 74.

occupation of servants is not *suo jure*, but as servants and representing their master, and therefore it is the occupation of the proprietor himself."¹⁰⁴

It should be emphasized that, unless there is a statutory provision to the contrary, title cannot be put in issue. Though the ejector is the true owner, he may none the less be accountable for his forcible entry. He cannot make himself judge in his own cause. It is sufficient that another was in fact in actual possession of the premises.¹⁰⁵

Enforcement of Discipline, Regulations, and Order

Under this general head may be grouped certain cases where authority to employ force is given by the law. Here, as in the instances already considered, the force must be reasonable in degree and appropriate to the purpose. Thus the father,¹⁰⁶ mother,¹⁰⁷ or a person to whom either has

¹⁰⁴ *State v. Curtis*, 20 N. C. (4 Dev. & B.) 363, per Ruffin, C. J. To the same effect, *Kerrains v. People*, 60 N. Y. 221, 19 Am. Rep. 158. Cf. *Beddall v. Maitland*, L. R. 17 Ch. D. 174. Plaintiff was minister, and defendants trustees, of a church. It appeared that "an unfortunate controversy arose in the church and congregation, and that there was a want of that generous Christian spirit which should characterize the action of religious societies." Defendants ejected plaintiff from the parsonage. By the rules of the church, ministers were assigned and removed only by the "conference" or general governing body, no power being given to the congregations or trustees. Hence, held that the plaintiff was not in possession as a servant of the congregation, and could not forcibly be removed by the latter's representatives, the defendant trustees. *BRISTOL v. BURR*, 120 N. Y. 427, 24 N. E. 937, 8 L. R. A. 710, *Chapin Cas. Torts*, 134.

¹⁰⁵ *Hammond v. Doty*, 184 Ill. 246, 56 N. E. 371; *Mercereau v. Bergen*, 15 N. J. Law, 244, 29 Am. Dec. 684; *N. Y. City Baptist Mission Soc. v. Potter*, 20 Misc. Rep. 191, 44 N. Y. Supp. 1051; *Dustin v. Cowdry*, 23 Vt. 631; *Iron Mountain & H. R. Co. v. Johnson*, 119 U. S. 608, 7 Sup. Ct. 339, 30 L. Ed. 504.

¹⁰⁶ *State v. Jones*, 95 N. C. 588, 59 Am. Rep. 282, note. A step-father is in loco parentis of his wife's children by a former husband, so long as they are supported and maintained by him, *Gorman v. State*, 42 Tex. 221; also one who lives with the mother as husband, although unmarried, *State v. Alford*, 68 N. C. 322.

¹⁰⁷ *Rowe v. Rugg*, 117 Iowa, 606, 91 N. W. 903, 94 Am. St. Rep. 318.

delegated authority,¹⁰⁸ may inflict chastisement upon the child as a disciplinary measure. As already seen, the minor child can maintain no action in tort against the parent.¹⁰⁹ Should the chastisement be excessive, however, the latter may be held criminally accountable, though the courts are not disposed to go closely into this question, since a large margin must be left to the judgment of the parent.¹¹⁰ A school master may likewise punish his pupil,¹¹¹ though his right is more limited than that of a parent,¹¹² and its abuse may constitute ground, not only for a criminal prosecution,¹¹³ but also for an action in tort.¹¹⁴

While the vessel is on its voyage, the master possesses a similar power over the crew for the purpose of enforcing obedience and preserving order. "Such an authority is

¹⁰⁸ *Rowe v. Rugg*, *supra*; *Harris v. State*, 115 Ga. 578, 41 S. E. 983.

¹⁰⁹ See *supra*, p. 133.

¹¹⁰ *Neal v. State*, 54 Ga. 281; *People v. Green*, 155 Mich. 524, 119 N. W. 1087, 21 L. R. A. (N. S.) 216. See *State v. Jones*, 95 N. C. 588, 59 Am. Rep. 282, note.

¹¹¹ *SHOEHAN v. STURGES*, 53 Conn. 481, 2 Atl. 841, Chapin Cas. Torta, 137; *Lander v. Seaver*, 32 Vt. 114, 76 Am. Dec. 156.

¹¹² "The books commonly assume that a teacher has the same right to chastise his pupil that a parent has to thus punish his child. But that is only true in a limited sense. The teacher has no general right of chastisement for all offenses, as has the parent. The teacher's right in that respect is restricted to the limits of his jurisdiction and responsibility as a teacher. But within those limits a teacher may exact a compliance with all reasonable commands, and may in a kind and reasonable spirit inflict corporal punishment upon a pupil for disobedience. This punishment should not be either cruel or excessive, and ought always to be apportioned to the gravity of the offense and within the bounds of moderation. But plainly, when complaint is made, the calm and honest judgment of the teacher as to what the situation required should have weight, as in the case of a parent under similar circumstances; and where no improper weapon has been employed, the presumption will be, until the contrary is made to appear, that what was done was rightly done." *Vanvactor v. State*, 113 Ind. 276, 279, 15 N. E. 341, 3 Am. St. Rep. 645.

¹¹³ *Boyd v. State*, 88 Ala. 169, 7 South. 268, 16 Am. St. Rep. 31; *State v. Mizner*, 50 Iowa, 145, 32 Am. Rep. 128; *Com. v. Randall*, 4 Gray (Mass.) 36.

¹¹⁴ *Patterson v. Nutter*, 78 Me. 509, 7 Atl. 273, 57 Am. Rep. 818.

absolutely necessary to the safety of the ship and of the lives of the persons on board,"¹¹⁵ and extends, though to a more limited extent, over the passengers, who must obey all reasonable orders and in an emergency may be compelled to work the ship.¹¹⁶ No such necessity can exist where carriage is by land, though for the failure to observe a reasonable regulation the passenger may be ejected.¹¹⁷ An innkeeper may under like circumstances remove a guest.¹¹⁸ In many states the willful disturbance of any assembly or meeting not unlawful in its character is made a criminal offense;¹¹⁹ but, even in the absence of such a statute, there can be no doubt that the disturber may be ejected.¹²⁰

¹¹⁵ *Brown v. Howard*, 14 Johns. (N. Y.) 119, 123; *The Stacey Clarke* (D. C.) 54 Fed. 533; *Michaelson v. Denison*, Fed. Cas. No. 9,523; *Roberts v. Eldridge*, Fed. Cas. No. 11,901, 1 Sprague, 54. Since this is based upon necessity, he will be liable for an assault committed while in port, where there is no emergency. *Padmore v. Piltz* (D. C.) 44 Fed. 104.

¹¹⁶ See *King v. Franklin*, 1 F. & F. 360.

¹¹⁷ E. g. failure to pay fare, *Chicago, R. I. & P. Ry. Co. v. Herring*, 57 Ill. 59; *Stone v. C. & N. W. R. Co.*, 47 Iowa, 82, 29 Am. Rep. 458; *Sanford v. Eighth Ave. R. Co.*, 23 N. Y. 343, 80 Am. Dec. 286; endangering the safety or interfering with the reasonable comfort and convenience of other passengers, *Putnam v. Broadway & Seventh Ave. R. Co.*, 55 N. Y. 108, 14 Am. Rep. 190.

¹¹⁸ See *McHugh v. Schlosser*, 159 Pa. 480, 28 Atl. 291, 23 L. R. A. 574, 39 Am. St. Rep. 699. "If a man comes into a public house and conducts himself in a disorderly manner, and the landlord requests him to go out, and he will not, the landlord may turn him out. * * To do this, the landlord may lay hands on him; and in so doing the landlord is not guilty of any breach of the peace. But if the person resists, and lays hands on the landlord, that is unjustifiable assault upon the landlord." *Howell v. Jackson*, 6 C. & P. 723, 725, 25 E. C. L. 657, per Parke, B.

¹¹⁹ See Penal Law N. Y. (Consol. Laws, c. 40) § 1470.

¹²⁰ *Wall v. Lee*, 34 N. Y. 141; *Furr v. Moss*, 52 N. C. 525; *Collier v. Hicks*, 2 B. & Ad. 663, 9 L. J. K. B. (O. S.) 300, 9 L. J. M. C. (O. S.) 138, 22 E. C. L. 278, 109 Eng. Repr. 1290; *Bradlaugh v. Erskine*, 47 L. T. Rep. (N. S.) 618, 31 Wkly. Rep. 365. Cf. *Cooper v. McKenna*, 124 Mass. 284, 26 Am. Rep. 667.

FALSE IMPRISONMENT

64. "False imprisonment consists in the unlawful detention of the person of another for any length of time, whereby he is deprived of his personal liberty."¹²¹

The detention need not be within a room. "Every confinement of the person is an imprisonment, whether it be in a common prison, or in a private house, or in the stocks, or even by forcibly detaining one in the public streets."¹²² Thus, restraining a passenger at the gate of a station until he pays his fare may constitute imprisonment.¹²³ It makes no difference how short the time may be, though this may bear on the amount of damages.¹²⁴ "Nor is it necessary that the act be under color of any legal or judicial proceeding."¹²⁵ Nor is it essential that there should be detention at a fixed place. One is imprisoned whose powers of locomotion are so controlled that he is forced to move or stay as directed by another. Were it otherwise, a party arrested would be deemed to have no cause of action for this tort unless and until he had actually been lodged in jail.¹²⁶

But the restraint must be total, not partial. There is no imprisonment where a way is left open, as where one is merely prevented from proceeding in a given direction, but is permitted to retrace his steps. Imprisonment is not to be

¹²¹ Civ. Code Ga. 1895, § 8851, quoted in *Thorpe v. Wray*, 68 Ga. 359, 367.

¹²² 3 Bl. Comm. 127.

¹²³ *Lynch v. Metropolitan El. Ry. Co.*, 90 N. Y. 77, 43 Am. Rep. 141.

¹²⁴ Cf. *Bridgett v. Coyney*, 1 M. & R. 211, 6 L. J. M. C. (O. S.) 42, 31 Rev. Rep. 316, 17 E. C. L. 661; *SIMPSON v. HILL*, 1 Esp. N. P. 431, Chapin Cas. Torts, 139, where it was said: "If the constable, in consequence of the defendant's charge, had for one moment taken possession of the plaintiff's person, it would be in point of law an imprisonment."

¹²⁵ *Comer v. Knowles*, 17 Kan. 436, 440, per Valentine, J. •

¹²⁶ See *Johnson v. Tompkins*, Fed. Cas. No. 7,416; *Fotheringham v. Adams Express Co.* (C. C.) 36 Fed. 252, 1 L. R. A. 474.

confounded with mere loss of freedom to go whithersoever one pleases. "A prison may have its boundary, large or narrow, visible and tangible, or, though real, still in the conception only; it may itself be movable or fixed, but a boundary it must have, and that boundary the party imprisoned must be prevented from passing. He must be prevented from leaving that place within the ambit of which the party imprisoning would confine him, except by prison breach."¹²⁷ This must necessarily assume that no hazard will be incurred in departing along the open way.¹²⁸

This wrong is akin to assault and battery, but the statement, sometimes made, that all imprisonments necessarily involve or presuppose the commission of an assault or battery, is not correct.¹²⁹ It is not required that there be a touching of the body, or an attempt to inflict violence. It will, of course, be imprisonment if I detain one or compel him to accompany me by a manual seizure of his person,¹³⁰ or by keeping him covered with a revolver,¹³¹ but it will likewise be imprisonment if he submits under a reasonable apprehension that otherwise force will be employed.¹³² One is not required to resist in order to preserve his rights, and

¹²⁷ *BIRD v. JONES*, 7 Q. B. 742, 743, 9 Jur. 870, 15 L. J. Q. B. 82, 53 E. C. L. 742, Chapin Cas. Torts, 141, per Coleridge, J.

¹²⁸ It may be no imprisonment to be locked in a room which is on a level with the ground and in which there is an open unbarred window extending to the floor. It would be quite another question if the room were on the fourth floor, though one might retreat by a fire escape ladder. But see Bigelow on Torts (8th Ed.) 341.

¹²⁹ *Emmett v. Lyne*, 1 Bos. & P. N. R. 255.

¹³⁰ *People v. Wheeler*, 73 Cal. 252, 14 Pac. 796.

¹³¹ *McNay v. Stratton*, 9 Ill. App. 215; *Hildebrand v. McCrum*, 101 Ind. 61.

¹³² *New York, P. & N. R. Co. v. Waldron*, 116 Md. 441, 82 Atl. 709, 39 L. R. A. (N. S.) 502; *Moore v. Thompson*, 92 Mich. 498, 52 N. W. 1000; *Ahern v. Collins*, 39 Mo. 145; *Callahan v. Searles*, 73 Hun, 238, 28 N. Y. Supp. 904; *Wood v. Lane*, 6 C. & P. 774, 25 E. C. L. 683. "If the bailiff, who has a process against one, says to him, while he is on horseback or in a coach, 'You are my prisoner, I have a writ against you,' upon which he submits, turns back, or goes with him, though the bailiff never touched him, yet it is an arrest, because he submitted to the process." *Horner v. Battyn*, Buller's N. P. 62.

thereby incur the risk of personal violence and insult.¹⁸³ Threats of force need not be expressed in words. They may be implied from acts, gestures, or the like,¹⁸⁴ as where an officer, after inquiring about stolen property, showed his shield and told plaintiff to accompany him to a specified place, which plaintiff did.¹⁸⁵ Nor need physical control be actually present during the entire period.¹⁸⁶ But there must be coercion, for if one of his own free choice remains where he is, though at liberty to depart if he pleases, he is not imprisoned at all.¹⁸⁷ Actual power to enforce compliance is not required. It is enough that it is apparent. If submission is made because one thinks a paper shown him to be a writ, it is imprisonment, though it be no writ at all. A pretended legal authority will be sufficient.¹⁸⁸ But if the means employed fall short of physical force, used or threatened, there can be no action for false imprisonment. For example, it is not enough that one has been induced to go to and remain in another city by misrepresentations and threats of a criminal prosecution. Here the submission would, it seems, be considered as voluntary.¹⁸⁹

¹⁸³ *PIKE v. HANSON*, 9 N. H. 491, Chapin Cas. Torts, 139.

¹⁸⁴ *Maner v. State*, 8 Tex. App. 361.

¹⁸⁵ *Callahan v. Searles*, 78 Hun, 238, 28 N. Y. Supp. 904. To the same effect, *Stevens v. O'Neill*, 51 App. Div. 364, 64 N. Y. Supp. 663, affirmed 169 N. Y. 375, 62 N. E. 424.

¹⁸⁶ See *Searles v. Viets*, 2 Thomp. & C. (N. Y.) 224. Here a constable informed plaintiff, while the latter was passing by, that he had a warrant for his arrest, saying, "You can go home, and get your horses put up, and take your tea, and come down." Plaintiff did so, and the constable said, "You move on, and I will overtake you." The constable overtook plaintiff at the border of the justice's plantation, and they entered the house together. The matter was adjourned, no bail being required, and on the adjourned day plaintiff was discharged. Held an imprisonment. But see *Berry v. Adamson*, 6 B. & C. 528, 13 E. C. L. 245.

¹⁸⁷ *Kirk & Son v. Garrett*, 84 Md. 383, 35 Atl. 1089; *Spoer v. Spooner*, 12 Metc. (53 Mass.) 281.

¹⁸⁸ *Goodell v. Tower*, 77 Vt. 61, 58 Atl. 790, 107 Am. St. Rep. 745. "It makes no difference whether the restraint of the person is caused without process or under color of process wholly illegal." *Ahern v.*

¹⁸⁹ *Payson v. Macomber*, 3 Allen (Mass.) 69. Cf. *State v. Lunsford*, 81 N. C. 528.

It is an interesting question whether the requirement of force or threats operates to destroy the possibility of an imprisonment by nonfeasance. The Supreme Court of Maine has recently answered in the negative.¹⁴⁰ Plaintiff had gone voluntarily on a yacht controlled by defendant, and was obliged to remain there, owing to the latter's refusal to provide her with a boat for passage to the shore. This was likened to the case where one should turn a key in a door, thereby preventing a person in the room from leaving. "The boat," said the court, "is the key. By refusing the boat he turns the key." At about the same time it was held on appeal in the King's Bench, though by a divided court, that a refusal to haul defendant's employé, a miner, to the surface, did not constitute imprisonment, although the miner was forced thereby to remain for a short time at the bottom of the shaft.¹⁴¹ It is submitted that the reasoning of the Maine Supreme Court is sound. It is to be noted, however, that under such circumstances the action, being based on nonfeasance, should be in case, and not in trespass.

Suppose there has been no possession of the person. Then there can be no arrest.¹⁴² Bare words are not enough. Thus in a much-cited case¹⁴³ it appeared that

Collins, 39 Mo. 145, 150. Cf. *Bridgett v. Coyney*, 1 M. & R. 211, 6 L. J. M. C. (O. S.) 42, 31 Rev. Rep. 316, 17 E. C. L. 661.

¹⁴⁰ *Whittaker v. Sanford*, 110 Me. 77, 85 Atl. 399, Ann. Cas. 1914B, 1202.

¹⁴¹ *Herd v. Weardale, S. C. & C. Co.* (1913) 3 L. R. K. B. 771. Vaughan Williams, L. J., dissenting, uses the analogy of the key, and says: "I shall be very much surprised if I hear that to detain a man by not allowing him to go out of a room, or any other place, is not false imprisonment, unless the detention can in some way or other be justified." Buckley and Hamilton, L. JJ., held that any rights plaintiff might have arose solely out of his contract of employment. Denying that, "If one man declines to give another facilities for leaving a place which he desires to leave, he imprisons him," the former observed: "He imprisons him if he prevents him from leaving; but he does not imprison him because he does not assist him to come out. The two propositions are perfectly different, the one from the other."

¹⁴² *SIMPSON v. HILL*, 1 Esp. N. P. 431, Chapin Cas. Torts, 139.

¹⁴³ *Genner v. Sparks*, 1 Salk. 79.

one Genner, a bailiff, had a warrant against Sparks, and went to him in his yard, told him of the warrant, and said, "I arrest you." Sparks had a fork in his hand, and kept Genner from touching him. There was here no arrest; but, said the court, "if the bailiff had touched him, that had been an arrest." So if there had been a submission, though no touching. The same result was reached where the officer merely said to one seated in a tavern, "I want you," to which the other replied, "Wait for me outside the door and I will come to you." The officer went out to wait, and waited fruitlessly.¹⁴⁴

The party detained must be conscious of his restraint.¹⁴⁵

DEFENSES—ARREST UNDER AND WITHOUT PROCESS—ENFORCEMENT OF DISCIPLINE, ETC.

65. Valid process constitutes a complete defense, but void or irregular process, though it will protect an officer if fair on its face, will not justify or excuse a party or his attorney, who participated in its issuance or service. If it be merely erroneous, there can be no responsibility.

For reasons of public policy, detention without process is permitted in certain cases for the purpose of preventing the commission of crime or of apprehending the offender, or to protect the party detained or enforce discipline.

Arrest under Process

An arrest, properly made, under valid legal process, cannot constitute false imprisonment, though the process be

¹⁴⁴ *Russen v. Lucas*, 1 O. & P. 153.

¹⁴⁵ Plaintiff, an infant, had been placed by his mother in a school. The schoolmaster refused to surrender him unless an amount claimed to be due was paid. It did not appear that plaintiff was aware that he could not depart. No recovery. *Herring v. Boyle*, 1 Crompt. M. & R. 377, 6 O. & P. 496, 3 L. J. Exch. 344, 4 Tyrw. 801, 25 E. C. L. 543.

issued maliciously and without probable cause.¹⁴⁶ It may, however, furnish ground for an action for malicious prosecution.¹⁴⁷ If the process is invalid, the liability of the officer making the arrest differs from that of the private individual who caused its issuance or service. The officer, it has been seen, is protected where the writ is fair on its face;¹⁴⁸ but the private individual may be held without regard to the appearance of the process.

Now "processes good on their face may," it has been said, "be absolutely void for want of jurisdiction in the court or magistrate that issues them, or they may be voidable for error, or they may be voidable for irregularity in obtaining them."¹⁴⁹ There are thus three classes to be considered: Void, irregular, and erroneous process. Though the last two are frequently considered under the head of voidable process, which they certainly are, it seems better to emphasize their essential differences by a dividing line strongly drawn. Where the process is void,¹⁵⁰ liability attaches when the wrong is committed, and no preliminary proceeding is necessary to vacate it or set it aside as a condition to the maintenance of an action. If process is irregular, as where a *ca. sa.* is issued before the return of a *n. fa.*,¹⁵¹ the

¹⁴⁶ *Marks v. Townsend*, 97 N. Y. 590; *Hobbs v. Ray*, 18 R. L. 84, 25 Atl. 694; *Murphy v. Martin*, 58 Wis. 276, 16 N. W. 603.

¹⁴⁷ See *infra*, p. 477.

¹⁴⁸ See *supra*, p. 154 et seq. *Bessler v. Peats*, 86 Ill. 275; *Hann v. Lloyd*, 50 N. J. Law, 1, 11 Atl. 346; *PEOPLE v. WARREN*, 5 Hill (N. Y.) 440, *Chapin Cas. Torts*, 80. The keeper of a workhouse cannot be held for false imprisonment, if in good faith he detains a prisoner for a term exceeding the sentence actually imposed, because of an error in what purported to be a copy of the mittimus. *Martin v. Collins*, 165 Mass. 256, 43 N. E. 91.

¹⁴⁹ *Everett v. Henderson*, 146 Mass. 89, 92, 14 N. E. 932, 4 Am. St. Rep. 284, per Knowlton, J.

¹⁵⁰ *Green v. Morse*, 5 Greenl. (5 Me.) 291; *Emery v. Hapgood*, 7 Gray (Mass.) 55, 66 Am. Dec. 459; *Wachsmuth v. Merchants' Nat. Bank*, 96 Mich. 426, 56 N. W. 9, 21 L. R. A. 278; *Hewitt v. Newburger*, 141 N. Y. 538, 36 N. E. 593; *Gulleapme v. Rowe*, 94 N. Y. 268, 46 Am. Rep. 141; *Frazier v. Turner*, 76 Wis. 562, 45 N. W. 411.

¹⁵¹ *Chapman v. Dyett*, 11 Wend. (N. Y.) 31, 25 Am. Dec. 598. Or an affidavit required to be "filed" with the magistrate issuing the

instigating party or attorney ¹⁵² is likewise responsible since one "is bound to see to it before he sets the law in motion that the process he obtains is regular and valid." ¹⁵³ But this must first be vacated or annulled before an action for false imprisonment will lie. ¹⁵⁴

Erroneous process differs from the others, in that the court or magistrate had jurisdiction to issue it and all the required forms have been observed. It is subject, however, to be set aside because the power was exercised under a mistake, which was not as to the method of its issuance. To illustrate: If no facts whatever have been laid before the court, the defect is jurisdictional. But it is otherwise if evidence has been presented, and the court has reached the conclusion that its "just weight and importance" requires that a writ issue, even though this conclusion is subsequently declared erroneous. ¹⁵⁵ Nor is a commitment for contempt either void or irregular, where its validity depended upon a finding that the disobedience had "defeated, impaired, impeded, or prejudiced" a right or remedy of one of the parties to the cause within the meaning of a statute. ¹⁵⁶ So a writ is likewise within this third class where it

writ was merely slipped under the door. *Whitcomb v. Cook*, 39 Vt. 585.

¹⁵² *Deyo v. Van Valkenburgh*, 5 Hill (N. Y.) 242; *Codrington v. Lloyd*, 8 Adol. & El. 449.

¹⁵³ *Cassier v. Fales*, 139 Mass. 461, 462, 1 N. E. 922, per Morton, C. J.

¹⁵⁴ *Fischer v. Langbein*, 103 N. Y. 84, 8 N. E. 251; *Winchester v. Everett*, 80 Me. 535, 15 Atl. 596, 1 L. R. A. 425, 6 Am. St. Rep. 228.

¹⁵⁵ *Dusy v. Helm*, 59 Cal. 188.

¹⁵⁶ Here it was well said that "when a court is called upon to adjudicate upon doubtful questions of law, or determine as to inferences to be drawn from circumstances reasonably susceptible of different interpretations or meanings, and calling for the exercise of the judicial function in their determination, its decision thereon does not render an order or process based upon it, although afterwards vacated or set aside as erroneous, void, or subject the party procuring it to an action for damages thereby inflicted." *Fischer v. Langbein*, 103 N. Y. 84, 94, 8 N. E. 251, per Ruger, C. J. To the same effect, *Johnson v. Morton*, 94 Mich. 1, 53 N. W. 816; *Hallock v. Dominy*, 69 N. Y. 238.

is set aside because an order of arrest had already been issued and served in an action for the same cause.¹⁵⁷

Where, therefore, the process is merely erroneous, neither party nor attorney incur responsibility for false imprisonment, a doctrine which "is founded in public policy, and is applicable alike to civil and criminal remedies and proceedings, that parties may be induced freely to resort to the courts and judicial officers for the enforcement of their rights and the remedy of their grievances, without the risk of undue punishment for their own ignorance of the law or for the errors of courts and judicial officers. The remedy of the party unjustly arrested or imprisoned is by the recovery of costs which may be awarded to him, or the redress which some statute may give him, or by an action for malicious prosecution in case the prosecution against him has been from unworthy motives and without probable cause."¹⁵⁸

Even where the process is void or irregular, one cannot be held for false imprisonment, unless he has actively participated in the detention,¹⁵⁹ either personally or through others for whose acts he was responsible. It will not, for instance, be sufficient that he has fairly laid facts before a magistrate, and that the latter in the exercise of his judgment has issued the warrant.¹⁶⁰ Nor will he be responsible merely because he has made a formal charge or signed the complaint. In so doing "he does not set a ministerial officer in motion, but a judicial officer. The opinion and judgment of a judicial officer are interposed between the charge and the imprisonment."¹⁶¹ It is a rule of policy that there

¹⁵⁷ *Marks v. Townsend*, 97 N. Y. 590. For further illustrations, see *Winchester v. Everett*, 80 Me. 535, 15 Atl. 596, 1 L. R. A. 425, 6 Am. St. Rep. 228; *Everett v. Henderson*, 146 Mass. 89, 14 N. E. 932, 4 Am. St. Rep. 284; *Williams v. Smith*, 14 C. B. (N. S.) 596, 108 E. C. L. 596.

¹⁵⁸ *Marks v. Townsend*, 97 N. Y. 590, 597, per Earl, J.

¹⁵⁹ *Develing v. Sheldon*, 83 Ill. 390; *Boeger v. Langenberg*, 97 Mo. 390, 11 S. W. 223, 10 Am. St. Rep. 322; *Hewitt v. Newburger*, 141 N. Y. 538, 36 N. E. 593.

¹⁶⁰ *Nowak v. Waller*, 56 Hun, 647, 10 N. Y. Supp. 199, affirmed 132 N. Y. 590, 30 N. E. 868.

¹⁶¹ *Austin v. Dowling*, L. R. 5 C. P. 534, 540, per Willes, J. To the same effect, *McIntosh v. Bullard*, 95 Ark. 227, 129 S. W. 85;

should be no presumption of personal interference by private persons in criminal proceedings.¹⁶² The same principle prevails where process has been issued in a civil action. Participation in the detention is not established merely by showing that one originated or was a party to the suit.¹⁶³ "It ought not to depend on the general intendment of the law that every writ or process is purchased by the party in whose favor it issues."¹⁶⁴ Where an attorney, servant, or agent has acted, the liability of the client, master, or principal must, as in other cases, be determined by the extent of the actual or implied authority, and by ascertaining whether there has been a ratification.¹⁶⁵

Suppose an officer, while making an arrest, calls for assistance, as at common law,¹⁶⁶ and usually under statute, he is permitted to do. Will one who responds to what he believes to be the call of duty become responsible if the warrant is found to be invalid? It is certainly harsh to require him to decide, perhaps during the struggle between officer and prisoner, with the possibility of a criminal prosecution confronting him if he refuses, and of an action for false imprisonment if he obeys. Furthermore, it has been urged that to permit him to withhold aid while he conducts an inquiry into the legality of the proceedings would be to defeat the object of the law and render it nugatory in many cases. These considerations have led some courts to accord protection, at least where the party making the arrest is known to be an officer,¹⁶⁷ though it has been refused where

Langford v. Boston & A. R. Co., 144 Mass. 431, 11 N. E. 697; *Murphy v. Walters*, 34 Mich. 180; *Gifford v. Wiggins*, 50 Minn. 401, 52 N. W. 904, 18 L. R. A. 356; *Booth v. Kurrus*, 55 N. J. Law, 370, 26 Atl. 1013.

¹⁶² *Murphy v. Walters*, 34 Mich. 180.

¹⁶³ *Outlaw v. Davis*, 27 Ill. 467; *Carratt v. Morley*, 1 Adol. & El. 18.

¹⁶⁴ *Bissell v. Gold*, 1 Wend. (N. Y.) 210, 216, 19 Am. Dec. 480, quoting *Percival v. Jones*, 2 Johns. Cas. 51.

¹⁶⁵ See *supra*, p. 209 et seq.; *Gearon v. Bank for Savings*, 50 N. Y. Super. Ct. 264, 6 Civ. Proc. R. 207.

¹⁶⁶ *McMahan v. Green*, 34 Vt. 69, 80 Am. Dec. 665.

¹⁶⁷ *Firestone v. Rice*, 71 Mich. 377, 38 N. W. 885, 15 Am. St. Rep. 266; *Taylor v. Alexander*, 6 Ohio, 145; *McMahan v. Green*, 34 Vt. 69, 80 Am. Dec. 665.

he only assumes to act by special appointment.¹⁶⁸ On the other hand, if there is hardship in holding the assisting citizen, it must be remembered that the arrested party has suffered a grievous wrong. But such considerations can scarcely be regarded as controlling. Logically it would seem that an officer has no power to command the doing of an unlawful act, and therefore, if he is a trespasser, all who act with him must be trespassers. They must stand or fall together.¹⁶⁹ Still this manifestly cannot apply to a case where the officer has become a trespasser *ab initio* by failing to return the writ, or by subsequent abuse of authority in which the stranger has not participated.¹⁷⁰

Arrest without Warrant

Under certain conditions the common law sanctioned, nay enjoined, an arrest and detention, though process was lacking. The duty to act need not be discussed here,¹⁷¹ since we are only concerned with the question of defenses to an action brought by the party detained. As will be shown, officers and private persons are regarded differently, and to determine the validity of their acts it will be necessary to ascertain whether the arrest was made—

(1) For a misdemeanor¹⁷² committed or attempted (a) in the presence or (b) out of the presence of the one making the arrest.

(2) For a felony¹⁷³ committed or attempted (a) in the presence or (b) out of the presence of the one making the arrest.

¹⁶⁸ *Dietrichs v. Schaw*, 43 Ind. 175.

¹⁶⁹ *Mitchell v. State*, 12 Ark. 50, 54 Am. Dec. 253; *Vinton v. Weaver*, 41 Me. 430; *Elder v. Morrison*, 10 Wend. (N. Y.) 128, 25 Am. Dec. 548.

¹⁷⁰ *Dehm v. Hinman*, 56 Conn. 320, 15 Atl. 741, 1 L. R. A. 374. See *Oystead v. Shed*, 12 Mass. 506.

¹⁷¹ See Bishop's New Criminal Procedure, § 164 et seq.

¹⁷² A crime less than a felony. Bishop's New Crim. Law, § 623.

¹⁷³ At common law a felony was an offense which occasioned a total forfeiture of lands or goods, or both, to which capital or other punishment might have been superadded. 4 Bl. Comm. 94. As forfeiture does not now prevail, this test can no longer be applied, but generally what was felony at common law is felony to-day. Bishop's

(1) *Misdemeanors*

Either a private person¹⁷⁴ or an officer¹⁷⁵ may arrest for a breach of the peace while it is being committed in his presence. The former cannot wait until it is over, unless there is reasonable ground for expecting that it is likely to be renewed or repeated.¹⁷⁶ An officer, however, it is said, may act within a reasonable time after the breach has ceased,¹⁷⁷ as well as where there is danger of its immediate commission.¹⁷⁸ As to misdemeanors other than breaches of the peace, it would seem that neither the private individual,¹⁷⁹ nor the officer,¹⁸⁰ may act. Still, on principle, it would appear that a private person who sees another committing a crime, though of lower grade, should be permitted to interfere, at least where the act is *malum in se*,¹⁸¹ though the cases do not appear to have gone to this extent, and stronger reasons demand that this authority should be given to the offi-

New Crim. Law, § 617. In many states it is defined by statute. See Penal Law N. Y. (Consol. Laws, c. 40) § 2.

¹⁷⁴ Price v. Seeley, 10 Cl. & Fin. 28, 8 Eng. Repr. 651; Webster v. Watts, 11 Q. B. 311, 116 Eng. Repr. 492.

¹⁷⁵ People v. Rounds, 67 Mich. 482, 35 N. W. 77; State v. Dierberger, 96 Mo. 666, 10 S. W. 168, 9 Am. St. Rep. 380; Douglass v. Barber, 18 R. I. 459, 28 Atl. 805.

¹⁷⁶ Phillips v. Trull, 11 Johns. (N. Y.) 486; State v. Campbell, 107 N. C. 948, 12 S. E. 441; Baynes v. Brewster, 2 Q. B. 375, 114 Eng. Repr. 149; Price v. Seeley, 10 Cl. & Fin. 28, 8 Eng. Repr. 651.

¹⁷⁷ "That is, the officer must immediately set about the arrest, and follow up the effort until the arrest is made. There must be a continued pursuit and no cessation of acts tending towards the arrest from the time of the commission of the offense until the apprehension of the offender." YATES v. STATE, 127 Ga. 813, 818, 56 S. E. 1017, 9 Ann. Cas. 620, Chapin Cas. Torts, 145. Cf. People v. Bartz, 53 Mich. 493, 19 N. W. 161; Harway v. Boulthbee, 4 C. & P. 350, 1 M. & R. 15, 19 E. C. L. 549.

¹⁷⁸ Hayes v. Mitchell, 80 Ala. 183; Quinn v. Helsel, 40 Mich. 576.

¹⁷⁹ Cf. Palmer v. Maine Cent. R. Co., 92 Me. 399, 42 Atl. 800, 44 L. R. A. 673, 69 Am. St. Rep. 513; Butolph v. Blust, 5 Lans. (N. Y.) 84.

¹⁸⁰ Cf. Cook v. Hastings, 150 Mich. 289, 114 N. W. 71, 14 L. R. A. (N. S.) 1123, 13 Ann. Cas. 194. Except an arrest of a suspicious night walker as provided by the statute of Winchester. Westberry v. Olanton, 136 Ga. 795, 72 S. E. 238; Miles v. Weston, 60 Ill. 361.

¹⁸¹ See Bishop's New Cr. Proc. § 171.

cer.¹⁸³ The rule is now largely statutory.¹⁸³ At all events the general rule is established that neither officer nor private individual may arrest for a crime not a felony, if committed without the presence of the person making the arrest.¹⁸⁴

(2) Felonies

Both an officer and a private person may arrest for a felony committed or attempted in their presence.¹⁸⁵ If the arrest has been made for a felony not committed in the officer's presence, he will be excused if he has reasonable ground to *believe* that a felony has been committed and that the party arrested committed it.¹⁸⁶ But if a private individual has made the arrest under such circumstances, he must, in addition to proving his belief in the party's guilt and reasonable grounds therefor, also establish that a felony *has in fact* been committed.¹⁸⁷ Some states have changed these rules by statute.¹⁸⁸

¹⁸³ Cf. *O'Connor v. Bucklin*, 59 N. H. 589; *Higby v. Pennsylvania R. Co.*, 209 Pa. 452, 58 Atl. 858.

¹⁸⁴ See Code N. Y. Cr. Proc. § 177, permitting an arrest by an officer without warrant "for a crime committed or attempted in his presence." Like power is given to a private person by section 183.

¹⁸⁵ *Shanley v. Wells*, 71 Ill. 78; *Matter of Kellam*, 55 Kan. 700, 41 Pac. 960; *Scott v. Eldridge*, 154 Mass. 25, 27 N. E. 677, 12 L. R. A. 379; *Ross v. Leggett*, 61 Mich. 445, 28 N. W. 695, 1 Am. St. Rep. 609; *Reisler v. Interborough R. T. Co.*, 79 Misc. Rep. 91, 139 N. Y. Supp. 335; *Musco v. Com.*, 86 Va. 443, 10 S. E. 534.

¹⁸⁶ *McMahon v. People*, 189 Ill. 222, 59 N. E. 584; *Kennedy v. State*, 107 Ind. 144, 6 N. E. 305, 57 Am. Rep. 99; *Rex v. Hunt*, 1 Moody, 93. And see cases cited in two succeeding notes.

¹⁸⁷ *Doering v. State*, 49 Ind. 56, 19 Am. Rep. 689; *White v. McQueen*, 96 Mich. 249, 55 N. W. 843; *McCarthy v. De Armit*, 99 Pa. 63; *BECKWITH v. PHILBY*, 6 B. & C. 635, *Chapin Cas. Torts*, 147.

¹⁸⁸ *Carr v. State*, 43 Ark. 99; *MORLEY v. CHASE*, 143 Mass. 396, 9 N. E. 767, *Chapin Cas. Torts*, 149; *Mallniemi v. Gronlund*, 92 Mich. 222, 52 N. W. 627, 31 Am. St. Rep. 576; *Reuck v. McGregor*, 32 N. J. Law, 70; *Holley v. Mix*, 3 Wend. (N. Y.) 350, 20 Am. Dec. 702; *Allen v. Wright*, 8 O. & P. 522, 34 E. C. L. 870.

¹⁸⁹ See Code Cr. Proc. N. Y. §§ 177 and 183, changing the common-law rule in cases where the crime is committed out of the presence of the party arresting. The officer may act where a felony has in fact been committed; but, if the arrest was by a private individual, he must establish that the person arrested was guilty of its commission. *Stearns v. Titus*, 193 N. Y. 272, 85 N. E. 1077; *Hawkins v.*

In all cases, whether the arrest be for a felony or for a breach of the peace, the party arrested must be taken before a magistrate¹⁸⁹ without delay.

Enforcement of Discipline, etc.

Under this head may be grouped several instances where a right of detention is recognized. Thus, for disciplinary purposes, a parent or one deputed by him may impose restraint upon his child, a guardian of the person upon his ward, and probably a master upon his apprentice.¹⁹⁰ So may a schoolmaster upon his pupil,¹⁹¹ and a ship's captain on passengers and crew during the voyage.¹⁹² The common law supposed the principal to be in custody of his bail, and the bail may take him when he pleases, either personally or by an authorized agent, since if it were not so he "might often be exposed to great and unnecessary hazard."¹⁹³ As it has been forcibly put, "the bail have their principal always upon a string, and may pull the string whenever they please, and render him in their own discharge."¹⁹⁴ Another illustration is found in the case of one of unsound mind, who may be restrained either by an officer or private person, but only if he is dangerous to

Kuhne, 153 App. Div. 216, 137 N. Y. Supp. 1090, affirmed 208 N. Y. 555, 101 N. E. 1104.

¹⁸⁹ *Linnen v. Banfield*, 114 Mich. 93, 72 N. W. 1; *Tobin v. Bell*, 73 App. Div. 41, 76 N. Y. Supp. 425.

¹⁹⁰ *Cooley on Torts* (3d Ed.) 299. And see *Penal Law N. Y.* (Consol. Laws, c. 40) § 246, subd. 4.

¹⁹¹ See *Fertich v. Michener*, 111 Ind. 472, 11 N. E. 605, 14 N. E. 68, 60 Am. St. Rep. 709, holding that detention after school hours "has none of the elements of false imprisonment about it, unless imposed from wanton, willful, and malicious motives."

¹⁹² "The inquiry, then, is whether it was proper for the support of discipline and subordination on board the ship to resort to this measure." *Gardner v. Bibbens*, Fed. Cas. No. 5,222, 1 Blatchf. & H. 356. To the same effect, *Brown v. Howard*, 14 Johns. (N. Y.) 120; *King v. Franklin*, 1 F. & F. 360.

¹⁹³ *Parker v. Bidwell*, 3 Conn. 84, 86, per Hosmer, C. J. To the same effect, *Comm. v. Brickett*, 8 Pick. (Mass.) 138; *Nicolls v. Ingersoll*, 7 Johns. (N. Y.) 145. And see *Code Civ. Proc. N. Y.* § 593; *Code Cr. Proc. N. Y.* § 591.

¹⁹⁴ *Anonymous*, 6 Mod. 231; *Read v. Case*, 4 Conn. 166, 171, 10 Am. Dec. 110.

himself or others,¹⁹⁵ and he cannot be detained indefinitely, or until he becomes harmless, but must be delivered to his friends, or to the proper authorities.¹⁹⁶ A carrier may not restrain a passenger for the purpose of compelling him to pay fare,¹⁹⁷ though he may do so for a reasonable time in order to inquire into the circumstances of the case.¹⁹⁸

¹⁹⁵ *Look v. Dean*, 108 Mass. 116, 11 Am. Rep. 323; *Keleher v. Putnam*, 60 N. H. 30, 49 Am. Rep. 304; *Emmerich v. Thorley*, 35 App. Div. 452, 54 N. Y. Supp. 791; *Fletcher v. Fletcher*, 28 L. J. Q. B. 134.

¹⁹⁶ *Colby v. Jackson*, 12 N. H. 562. And see Penal Law N. Y. (Consol. Laws, c. 40) § 246, subd. 6.

¹⁹⁷ *Lynch v. Metropolitan El. R. Co.*, 90 N. Y. 77, 43 Am. Rep. 141.

¹⁹⁸ *Standish v. Narragansett S. S. Co.*, 111 Mass. 512, 15 Am. Rep. 66.

SEDUCTION

66. Seduction is "the wrong of inducing a female to consent to unlawful sexual intercourse, by enticements and persuasions overcoming her reluctance and scruples."¹⁹⁹ Logically the woman cannot sue, because she has consented. *Volenti non fit injuria*.²⁰⁰ In some states, however, she is given a statutory cause of action.²⁰¹ The right of the husband, parent, and master to recover against the seducer is elsewhere discussed.²⁰²

¹⁹⁹ Abb. L. Dict. quoted in *Hood v. Sudderth*, 111 N. C. 215, 220, 16 S. E. 397.

²⁰⁰ *Welsund v. Schueller*, 98 Minn. 475, 108 N. W. 483, 8 Ann. Cas. 1115; *Robinson v. Musser*, 78 Mo. 153; *Hamilton v. Lomax*, 26 Barb. (N. Y.) 615. Cf. *Graham v. Wallace*, 50 App. Div. 101, 63 N. Y. Supp. 372, sustaining an action by a ward against her guardian. Where adultery and fornication are crimes, the woman is *particeps criminis*, and hence cannot be heard to complain of a wrong which she helped to produce. *Paul v. Frazier*, 3 Mass. 71, 3 Am. Dec. 95; *Oberlin v. Upson*, 84 Ohio St. 111, 95 N. E. 511. But see *Hood v. Sudderth*, 111 N. C. 215, 16 S. E. 397 (female over 21). Cf. *Scarlett v. Norwood*, 115 N. C. 284, 20 S. E. 459.

²⁰¹ Code Civ. Proc. Cal. § 374 (if unmarried); *Marshall v. Taylor*, 98 Cal. 55, 32 Pac. 867, 35 Am. St. Rep. 144; *Burns' Ann. St. Ind.* 1914, § 264 (if unmarried); *McCoy v. Trucks*, 121 Ind. 292, 23 N. E. 93; *St. Mich. (How. Ann. St. [2d Ed.] 1912) § 13132*; *Greenman v. O'Riley*, 144 Mich. 534, 108 N. W. 421, 115 Am. St. Rep. 466. Proof of her unchastity at the time of the alleged seduction is a bar to recovery, though chastity, once lost, may be regained by repentance and reformation. See *Robinson v. Powers*, 129 Ind. 480, 28 N. E. 1112; *Greenman v. O'Riley*, 144 Mich. 534, 108 N. W. 421, 115 Am. St. Rep. 466.

²⁰² See *infra*, pp. 459, 468, 473.

CHAPTER IX

THE RIGHT OF PRIVACY

67. Whether and to what extent the law will recognize the existence of a so-called "right of privacy" is not clear. The decisions hereafter considered have dealt almost entirely with the use of picture or name for commercial purposes and are in conflict.

In its widest sense, "the so-called right of privacy is, as the phrase suggests, founded upon the claim that a man has the right to pass through this world, if he wills, without having his picture published, his business enterprises discussed, his successful experiments written up for the benefit of others or his eccentricities commented upon either in hand bills, circulars, catalogues, periodicals, or newspapers, and necessarily that the things which may not be written and published of him must not be spoken of him by his neighbors, whether the comment be favorable or otherwise."¹ It is evident that such a claim cannot be sanctioned. But up to a certain point one may well assert "the right to be let alone,"² though how far this extends has not been determined. Cases have largely dealt with the use of plaintiff's picture or name for advertising or trade purposes. This question was not squarely presented³ until in 1902, when the New York Court of Appeals

¹ *Roberson v. Rochester Folding Box Co.*, 171 N. Y. 538, 544, 64 N. E. 442, 59 L. R. A. 478, 89 Am. St. Rep. 828, per Parker, C. J.

² See "The Right of Privacy," 4 Harvard L. R. 193, 195 (Dec. 1890), where the theory that such a right existed was probably first advanced.

³ While the right of privacy had tentatively been presented to the courts, the decisions had been based upon other grounds, e. g., a violation of property rights, *Albert v. Strange*, 2 De G. & Sm. 652, 13 Jur. 507, 64 Eng. Repr. 293; *Gee v. Pritchard*, 2 Swanst. 402, 19 Rev. Rep. 87, 36 Eng. Repr. 670; lack of personal interest, *Schuyler v. Curtis*, 147 N. Y. 434, 42 N. E. 22, 31 L. R. A. 286, 49 Am. St. Rep. 671; *Atkinson v. John E. Doherty & Co.*, 121 Mich. 372, 80 N. W. 235, 46 L. R. A. 219, 80 Am. St. Rep. 507; public character of the subject, *Corliss v. E. W. Walker Co.* (C. C.) 64 Fed. 280, 31 L. R. A. 283.

refused an injunction and damages, this conclusion being based, it would seem, largely upon the argument *ab inconvenienti* and because of a lack of precedent.⁴ Three years later, the Supreme Court of Georgia took a different and, it is submitted, a better view,⁵ asserting in broad language that such a right existed. Ranged with Georgia will be found Kentucky,⁶ Missouri,⁷ and New Jersey.⁸ Some of these decisions treat the right of privacy as a property right. On the other hand, in Rhode Island the reasoning of the New York Court of Appeals has been approved.⁹

⁴ *Roberson v. Rochester Folding Box Co.*, supra. It was said (171 N. Y. 544, 64 N. E. 443, 59 L. R. A. 478, 89 Am. St. Rep. 828): "If such a principle be incorporated into the body of the law through the instrumentality of a court of equity, the attempts to logically apply the principle will necessarily result, not only in a vast amount of litigation, but in litigation bordering upon the absurd, for the right of privacy, once established as a legal doctrine, cannot be confined to the restraint of the publication of a likeness, but must necessarily embrace as well the publication of a word picture, a comment upon one's looks, conduct, domestic relations, or habits." Subsequent to this decision a statute gave a cause of action for the unauthorized use of the name or picture of any person for advertising purposes or for the purposes of trade. Consol. Laws N. Y. c. 6, art. 5, amended by Laws 1911, c. 226, held constitutional in *Sperry & Hutchinson Co. v. Rhodes*, 220 U. S. 502, 31 Sup. Ct. 490, 55 L. Ed. 561. For construction of this statute, see *Binns v. Vitograph Co. of America*, 210 N. Y. 51, 103 N. E. 1108, L. R. A. 1915C, 839, Ann. Cas. 1915B, 1024; *Colyer v. Richard K. Fox Pub. Co.*, 162 App. Div. 297, 146 N. Y. Supp. 999; *D'Altomonte v. New York Herald Co.*, 154 App. Div. 453, 139 N. Y. Supp. 200.

⁵ *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S. E. 68, 69 L. R. A. 101, 106 Am. St. Rep. 104, 2 Ann. Cas. 561.

⁶ *Foster-Milburn Co. v. Chinn*, 134 Ky. 424, 120 S. W. 364, 34 L. R. A. (N. S.) 1137, 135 Am. St. Rep. 417.

⁷ *Munden v. Harris*, 153 Mo. App. 652, at page 660, 134 S. W. 1076, at page 1079, where it was concluded "that one has an exclusive right to his picture on the score of its being a property right of material profit," also "a property right of value, in that it is one of the modes of securing to a person the enjoyment of life and the exercise of liberty."

⁸ *Edison v. Edison Polyform & Mfg. Co.*, 73 N. J. Eq. 136, 67 Atl.

⁹ *Henry v. Cherry*, 30 R. I. 13, 73 Atl. 97, 24 L. R. A. (N. S.) 991, 136 Am. St. Rep. 928, 18 Ann. Cas. 1006.

In the foregoing cases there was a commercial use of the picture or name. Suppose the purpose was noncommercial, as where the publication was in connection with an item of news, or perhaps a better illustration, as where plaintiff's admirers erect a statue in his honor. Now if a violation of privacy is *per se* an infringement of property, there seems no reason why any distinction should be drawn. But to carry the prevailing doctrine to its extreme would, as the New York Court of Appeals has shown, work an absurdity. Regard should be had to the nature of the publication and the celebrity or notoriety of the subject. Each case must be determined largely by its peculiar facts. On the ground that the subject was a "public character" relief has been denied.¹⁰ But, though one who has attained a position of prominence cannot well complain if his personality and affairs are discussed to some extent, provided he is not defamed, for he "may not claim the same immunity from publicity" that others may,¹¹ it surely cannot be said that his mere celebrity will justify the display of his name or picture no matter what the purpose may be. Is there no limit to the kind of publicity which he must expect—no difference between a biographical sketch and a cigar band? Furthermore, whether the individual be a "public character" or not, there would seem to be a difference between an article directly concerning him and an irrelevant reference made in the course of an article concerning some third party, at least where its general tenor is disparaging, though only to the latter. Yet it has been held that, where one has publicly been accused of crime, there is no cause of action in favor of an innocent relative, whose picture is displayed, apparently for the mere purpose of arousing interest.¹²

392, where the court considered that the peculiar cast of one's features is a property right.

¹⁰ *Corliss v. E. W. Walker Co.* (C. C.) 64 Fed. 280, 31 L. R. A. 283. And see *Vassar College v. Loose-Wiles Biscuit Co.* (D. C.) 197 Fed. 982; *Von Thodorovich v. Franz Josef Beneficial Ass'n* (C. C.) 154 Fed. 911.

¹¹ *Edison v. Edison Polyform & Mfg. Co.*, 73 N. J. Eq. 136, 142, 67 Atl. 392.

¹² *Hillman v. Star Publishing Co.*, 64 Wash. 691, 117 Pac. 594, 35

Another question arises where the picture has been placed in a so-called "Rogues' Gallery," or collection of photographs of criminals kept by the police. In Louisiana it has been held that taking the picture of one accused of crime should be postponed until his conviction, unless it is evident that it is necessary to do so for purposes of identification or for the detection of the crime.¹³ This would appear to be a reasonable rule,¹⁴ affording proper protection to the individual, while not impeding officers of the law in their efforts to detect and punish crime.

Whether an author's *nom de plume* may be used commercially or otherwise must be determined by the same principles which governs the right to use his real name.¹⁵

Whatever shape the law may finally assume with regard to the right of privacy, it seems likely that it will always be considered to be a purely personal right, as such not to be enforced, except by the party himself. It would be carrying the doctrine too far, were a relative or friend permitted to recover for the wounding of his own feelings.¹⁶

In conclusion, it should be observed that cases involving the right of privacy must be distinguished from those wherein it has been held that a photographer may not make copies of a customer's photograph without the latter's consent. They rest on different principles.¹⁷

L. R. A. (N. S.) 595. Cf. *Moser v. Press Publishing Co.*, 59 Misc. Rep. 78, 109 N. Y. Supp. 963.

¹³ Referring to the right to take and expose the picture of an unwilling person, it was said: "We do not know that it has afforded any ground for litigation when not exaggerated to the point of impeaching character. Here the purpose goes much further. The picture is to remain as evidence of a damning nature." *Schulman v. Whitaker*, 117 La. 704, 706, 42 South. 227, 7 L. R. A. (N. S.) 274, 8 Ann. Cas. 1174; *Itzkovitch v. Whitaker*, 117 La. 708, 42 South. 228, 116 Am. St. Rep. 215.

¹⁴ See *Mabry v. Kettering*, 89 Ark. 551, 117 S. W. 746, 16 Ann. Cas. 1123.

¹⁵ *Clemens v. Belford, Clark & Co.* (C. C.) 14 Fed. 729; *Ellis v. Hurst*, 66 Misc. Rep. 235, 121 N. Y. Supp. 438.

¹⁶ *Atkinson v. John E. Doherty & Co.*, 121 Mich. 372, 80 N. W. 285, 46 L. R. A. 219, 80 Am. St. Rep. 507; *Schuyler v. Curtis*, 147 N. Y. 434, 42 N. E. 22, 31 L. R. A. 286, 49 Am. St. Rep. 671.

¹⁷ See *Douglas v. Stokes*, 149 Ky. 506, 149 S. W. 849, 42 L. R. A. (N. S.) 386, Ann. Cas. 1914B, 374.

CHAPTER X

INJURIES TO REPUTATION—DEFAMATION

- 68. Definition.
- 69. Publication.
- 70. Slander—When Damage Presumed.
- 71. Libel—When Damage Presumed.
- 72. Defamation with Special Damage.
- 73. Complete Defenses.
- 74. Partial Defenses.

DEFINITION

68. "By defamation is understood a false publication calculated to bring one into disrepute."¹ Roughly put, if communicated through the sense of hearing, it is termed slander; if through the sense of sight, it is libel.

This tort arises out of the invasion of the right, which every man possesses, to have reputation remain unimpaired. As has been noted above, it may be committed in two ways, thus giving rise to the distinction between slander and libel. The former is sometimes defined in such a manner as to indicate that there must be spoken words;² but this is not accurate, for there is no doubt that slander may be committed by singing, by clicking in the Morse code in the hearing of one who understands, or even, it is submitted, by whistling.³ So libel, being an appeal to the

¹ Cooley on Torts (3d Ed.) vol. 1, p. 266, quoted in *Hollenbeck v. Hall*, 103 Iowa, 214, 216, 72 N. W. 518, 39 L. R. A. 734, 64 Am. St. Rep. 175.

² "Slander is defamation without legal excuse published orally by words spoken, being the subject of the sense of hearing." Newell on Slander and Libel, p. 33, quoted in *Fredrickson v. Johnson*, 60 Minn. 337, 340, 62 N. W. 388.

³ Suppose an officer of a credit association, having charge of the compilation of a list of traders who were financially worthless, should

eye, need not be by writing, print, or picture. Thus, it would be libel to place a lamp in front of another's dwelling, and keep it lighted in the daytime, if it were customary to designate brothels in such a manner,⁴ to hang or burn him in effigy,⁵ or to fix a gallows against his door.⁶ It may be that gestures and signs—for example, movements of the lips of dumb people—are equivalent to spoken words, and hence might be slander, but not libel.⁷ If so, it must be put down as an exception to the general rule of difference. On the other hand, where defamatory matter is communicated by sound, for the purpose of being reduced to writing, which is actually done, such communication may, it would seem, be considered libel, as where a letter is dictated to a stenographer, or a message transmitted over the telegraph by one operator to another.⁸

The distinction between the two forms of defamation will be found important. Libel is both a tort and a crime; slander, in the absence of a statute to the contrary, only a tort. The former is deemed much more mischievous, and is considered a crime chiefly because of its natural tendency to provoke a breach of the peace by the party defamed. But there may be a libel which is criminal, though not civil, as where it is calculated to bring about corruption of the public morals, or discontent with the government, or violations of the criminal law.⁹

It will be no defense, though punitive damages may thereby be eliminated, that the defamation was the result

be asked on an unprivileged occasion whether the name of a certain merchant appeared therein, and should say nothing, but should whistle the tune of "I've got 'em on the list" from Gilbert and Sullivan's "Mikado" to one who was acquainted therewith?

⁴ *Jeffries v. Duncombe*, 2 Campb. 3, 11 East, 226, 103 Eng. Repr. 991, though the case apparently went on the ground of nuisance.

⁵ *Johnson v. Com.*, 22 Wkly. Notes Cas. (Pa.) 68; *Eyre v. Garlick*, 42 J. P. 68. Cf. *Monson v. Tussauds* (1894) 1 Q. B. 671, 58 J. P. 524, 63 L. J. Q. B. 454, 70 L. T. Rep. N. S. 335.

⁶ *Case de Libellis Famosis*, 5 Coke, 125 a, 77 Eng. Repr. 250.

⁷ *Jaggard on Torts*, vol. 1, p. 477; *Pollock on Torts*, pp. 204, 205.

⁸ *Peterson v. West Union Tel. Co.*, 72 Minn. 41, 74 N. W. 1022, 40 L. R. A. 661, 71 Am. St. Rep. 461.

⁹ See *Bishop's New Criminal Law*, vol. 2, §§ 909-912.

of the defamer's mistake. Reputation is none the less affected.¹⁰

Defaming a Class

Two or more persons may, of course, be affected by the same defamatory matter, so that each may have his action.¹¹ Thus, where the charge is against A. and his son,¹² or A. and his friend,¹³ the son or friend may sue as well as A.¹⁴ So may two sisters, who are stated to be illegitimate,¹⁵ and an officer, who is held up to ridicule in a caricature of the members of a court-martial.¹⁶ A different question arises when the publication is of and concerning a class. Is each member deemed to suffer individual defamation? The difficulty of formulating a governing principle is apparent. The class might be so large in numbers and the abuse so general in tenor that it is evident that no private injury could have resulted. "Thus, if a man wrote that all lawyers were thieves, no particular lawyer could sue him, unless there is something to point to the particular individual."¹⁷ And the same result might well be reached where there was an attack upon the mem-

¹⁰ As where "cultured gentleman" in a dispatch was changed in transmission to "colored gentleman." *Upton v. Times-Democrat Pub. Co.*, 104 La. 141, 28 South. 970. For mistaken identity, see *Taylor v. Hearst*, 107 Cal. 262, 40 Pac. 392; *Sweet v. Post Pub. Co.*, 215 Mass. 450, 102 N. E. 660, 47 L. R. A. (N. S.) 240, Ann. Cas. 1914D, 533; *Griebel v. Rochester Printing Co.*, 60 Hun, 319, 14 N. Y. Supp. 848. Cf. *Hanson v. Globe Newspaper Co.*, 159 Mass. 293, 34 N. E. 462, 20 L. R. A. 856.

¹¹ Cf. *Hoey v. New York Times Co.*, 138 App. Div. 149, 122 N. Y. Supp. 978.

¹² *Constitution Pub. Co. v. Way*, 94 Ga. 120, 21 S. E. 139.

¹³ *Clark v. Creitzburgh*, 4 McCord (S. C.) 491.

¹⁴ "If plaintiff's name was annexed to the publication, so as to make the alleged libel applicable to him, it is immaterial that other names were also annexed to the libelous words, even though one of them was connected by the copulative 'and' with the name of plaintiff." *Robnett v. McDonald*, 65 Cal. 611, 4 Pac. 651.

¹⁵ *Shelby v. Sun Printing & Pub. Ass'n*, 38 Hun (N. Y.) 474, affirmed 109 N. Y. 611, 15 N. E. 895.

¹⁶ *Ellis v. Kimball*, 16 Pick. (Mass.) 132.

¹⁷ *Eastwood v. Holmes*, 1 F. & F. 347, 349, per Willes, J.

bers of a regiment,¹⁸ or the officers thereof.¹⁹ On the other hand, a charge that an election board were drunk while on duty, and were totally unfit to receive names for registry, "points the finger of condemnation at every member thereof, though none are named, and every member of the board may maintain an action therefor."²⁰ So does an article denouncing the verdict of a certain jury as infamous and concluding, "We cannot express the contempt which should be felt for these twelve men who have thus not only offended public opinion but have done injustice to their own oaths."²¹

Now it is evident that an action cannot be based upon mere invective against mankind in general, or against a particular order of men. It must descend to particulars and individuals,²² or, in other words, the nature of the defamatory matter must be such that a personal application may reasonably be inferred.²³ In other words, is the defamation so localized that the hearer or seer might fairly conclude that it was leveled at the individual seeking redress in the sense that he, though in common with others, may be deemed to have suffered injury to his reputation?²⁴ Each case must necessarily be determined largely with reference to the particular facts involved.²⁵ But,

¹⁸ *Story v. Jones*, 52 Ill. App. 112.

¹⁹ *Sumner v. Buel*, 12 Johns. (N. Y.) 475. But see *Ryckman v. Delavan*, 25 Wend. (N. Y.) 186.

²⁰ *Reilly v. Curtiss*, 83 N. J. Law, 77, 84 Atl. 199. Cf. *Lever v. Dally States Pub. Co.*, 123 La. 594, 49 South. 206, 23 L. R. A. (N. S.) 726, 131 Am. St. Rep. 356.

²¹ *Byers v. Martin*, 2 Colo. 605, 25 Am. Rep. 755.

²² *King v. Alme*, 3 Salk. 224, 1 Ld. Raym. 486.

²³ See *Ryckman v. Delavan*, 25 Wend. (N. Y.) 186.

²⁴ See *Wofford v. Meeks*, 129 Ala. 349, 30 South. 625, 55 L. R. A. 214, 87 Am. St. Rep. 66; *Hardy v. Williamson*, 86 Ga. 551, 12 S. E. 874, 22 Am. St. Rep. 479; *Weston v. Commercial Advertiser Ass'n*, 184 N. Y. 479, 77 N. E. 660; *Arnold v. Ingram*, 151 Wis. 438, 138 N. W. 111, Ann. Cas. 1914C, 976; *International Text-Book Co. v. Leader Printing Co.* (C. C.) 189 Fed. 86.

²⁵ Recovery allowed in the following: *Goldsborough v. Orem & Johnson*, 103 Md. 671, 64 Atl. 36 (charge that the vestry of a certain church had relentlessly turned "their back upon legal and moral

though a libel concerning a class as such may give rise to no cause of action in favor of an individual, it will subject the offender to a criminal prosecution, since it tends to cause a breach of the peace.²⁶

PUBLICATION

69. It is essential that the defamatory matter shall have been communicated to third persons, who comprehend its defamatory nature. This is known in law as "publication."

Since defamation is actionable because the reputation of the party defamed is affected, it is necessary that the mat-

obligation to the detriment of a rector, * * * who suffered himself to become debilitated while plodding along the path of duty to his congregation," etc.; plaintiff was a member of the vestry and had voted in favor of a resolution requesting the rector's resignation); *Gidney v. Blake*, 11 Johns. (N. Y.) 54 ("your children are thieves, and I can prove it;" plaintiff was one of the children); *Cook v. Rief*, 52 N. Y. Super. Ct. 302 (charge that a house of assignation was kept by "those people up stairs"; plaintiff was one of "those people"); *Fenstermaker v. Tribune Pub. Co.*, 12 Utah, 439, 43 Pac. 112, 35 L. R. A. 611 (charge that a named family described as living at a certain ranch had cruelly treated a child; plaintiff as husband was head of the family); *Foxcroft v. Lacy*, Hob. 89 (charge that seventeen defendants in an action "helped to murder Henry Farrer"; plaintiff was one of the defendants). Contra: *Comes v. Cruce*, 85 Ark. 79, 107 S. W. 185, 14 Ann. Cas. 327 (article stated that a murder near a river "was the result of the wine joints that are now in operation there," that the trouble leading to the killing occurred there, that "the decoction sold as wine so inflamed the passion of the negroes that they were in the right condition to commit any crime or go any length to resent or revenge any imaginary grievance," and that it is the general opinion that the wine "is adulterated and much of it possibly never saw a grape"; plaintiff was a grape grower and maker and seller of wine); *Watson v. Detroit Journal Co.*, 143 Mich. 430, 107 N. W. 81, 5 L. R. A. (N. S.) 480, 8 Ann. Cas. 131 (plaintiff sold trading stamps; article referred generally to trading stamp concerns of a city, describing the business as a "get-rich-quick industry," etc.).

²⁶ *Palmer v. City of Concord*, 48 N. H. 211, 97 Am. Dec. 605; *Rex v. Williams*, 5 Barn. & Ald. 328. Cf. *State v. Brady*, 44 Kan. 435, 24 Pac. 948, 9 L. R. A. 606, 21 Am. St. Rep. 296.

ter be heard or seen by others, who must comprehend its defamatory nature, though to sustain an indictment it will be enough that the libel be laid before the one affected, since this may be sufficient to induce him to break the peace.²⁷ If only the party concerned hear the slander,²⁸ or see the libel,²⁹ or if the third party who heard or saw did not comprehend, as if he were too young,³⁰ or if the words were in a foreign language not understood by him,³¹ no action is maintainable. Hence it will not be sufficient that the writer has sent or mailed a letter directly to the individual defamed,³² and even though the contents have in fact been seen by others, publication is not considered to have taken place, where the sender had no reason to suppose that the letter would be opened and read by another than the addressee.³³ But publication may occur before as well as after the mailing, as where the contents are dictated to a stenographer, or the letter copied by a clerk or office boy,³⁴ though in New York it has been con-

²⁷ *Warnock v. Mitchell* (C. C.) 43 Fed. 428; *Clutterbuck v. Chaffers*, 1 Stark. 471. For criminal libel, see *State v. Avery*, 7 Conn. 266, 18 Am. Dec. 105; Penal Law N. Y. (Consol. Laws, c. 40) § 1343. Cf. *Hodges v. State*, 5 Humph. (Tenn.) 112.

²⁸ *Economopoulos v. A. G. Pollard Co.*, 218 Mass. 294, 105 N. E. 896; *SHEFFILL v. VAN DEUSEN*, 13 Gray (Mass.) 304, 74 Am. Dec. 632, Chapin Cas. Torts, 152. It will be sufficient that it be alleged that the words were spoken in the presence of others, without stating that it was in their hearing. *Hall v. Hennesley*, Cro. Eliz. 486.

²⁹ *Yousling v. Dare*, 122 Iowa, 539, 98 N. W. 371; *Fry v. McCord Bros.*, 95 Tenn. 678, 33 S. W. 568; *Clutterbuck v. Chaffers*, 1 Stark. 471.

³⁰ *Sullivan v. Sullivan*, 48 Ill. App. 435.

³¹ *Mielenz v. Quasdorf*, 68 Iowa, 726, 28 N. W. 41; *Economopoulos v. A. G. Pollard Co.*, 218 Mass. 294, 105 N. E. 896; *Wormouth v. Cramer*, 3 Wend. (N. Y.) 394.

³² *Spalts v. Poundstone*, 87 Ind. 522, 44 Am. Rep. 773; *Yousling v. Dare*, 122 Iowa, 539, 98 N. W. 371; *Sylvia v. Miller*, 96 Tenn. 94, 33 S. W. 921; *Wilcox v. Moon*, 64 Vt. 450, 24 Atl. 244, 15 L. R. A. 760, 33 Am. St. Rep. 936.

³³ *Roberts v. English Mfg. Co.*, 155 Ala. 414, 46 South. 752; *Rumney v. Worthley*, 186 Mass. 144, 71 N. E. 316, 1 Ann. Cas. 189; *Dela-croix v. Thevenot*, 2 Stark. 63.

³⁴ *Ferdon v. Dickens*, 161 Ala. 181, 49 South. 888; *Gambrill v.*

sidered otherwise, where both composer and stenographer were in the employ of the defendant corporation in connection with whose business the letter was sent. Being servants of a common master, there was held to be but a single act of the corporation. The stenographer could not be regarded as a third person.³⁵ There is publication when a postal card,³⁶ or an envelope,³⁷ on which libelous words appear, is deposited in the mail, when a telegram is handed to a clerk in the telegraph office,³⁸ or transmitted by one operator to another,³⁹ unless the defamatory character of the words is both latent and in fact uncomprehended by all parties engaged in the work of conveying or transmitting.

Recovery will not be denied merely because the person to whom the imputation is published knows that it is false.⁴⁰

That the wrong consists in the publication is illustrated by cases where the defamatory matter has been repeated

Schooley, 93 Md. 48, 48 Atl. 730, 52 L. R. A. 88, 86 Am. St. Rep. 414; Pullman v. Walter Hill & Co. (1891) 1 Q. B. 524. See Sun Life Assurance Co. of Canada v. Bailey, 101 Va. 443, 44 S. E. 692.

³⁵ OWEN v. OGILVIE PUBLISHING CO., 32 App. Div. 466, 53 N. Y. Supp. 1033, Chapin Cas. Torts, 153.

³⁶ Sadgrove v. Hole, [1901] 2 K. B. 1, 70 L. J. K. B. 455, 84 L. T. Rep. N. S. 647, 49 Wkly. Rep. 473.

³⁷ Muetze v. Tuteur, 77 Wis. 236, 46 N. W. 123, 9 L. R. A. 86, 20 Am. St. Rep. 115.

³⁸ Monson v. Lathrop, 96 Wis. 386, 71 N. W. 596, 65 Am. St. Rep. 54; Williamson v. Freer, L. R. 9 C. P. 393, 43 L. J. C. P. 161.

³⁹ Peterson v. West. Union Tel. Co., 65 Minn. 18, 67 N. W. 646, 33 L. R. A. 302.

⁴⁰ As where the sole auditor is a woman with whom plaintiff is said to have committed adultery. Marble v. Chapin, 132 Mass. 225. Here it was observed: "No one can say with certainty that the charge may not have had the effect on the mind of [the hearer] to injure the plaintiff, though she knew it was untrue in its details, so far as it charged her with being an accomplice. Besides, the injury to the character of the plaintiff is not the sole element of damage. The jury have the right to consider the mental suffering of the plaintiff up to the time of the trial, caused by the publication of these slanderous words." The same rule prevails with respect to special damage caused by the act of third parties. See *infra*, p. 318.

or republished by another. As has been seen,⁴¹ this usually is not deemed a proximate result of the original defamation, so as to subject the first defamer to liability therefor,⁴² although it may be found that under the circumstances he should have foreseen it,⁴³ and certainly he will be responsible where it was authorized or procured by him.⁴⁴ Manifestly there can be no cause of action where the publication is by the party defamed or through his procurement,⁴⁵ as where he requests it.⁴⁶

To the general rule that each person who commits an act of publication will incur responsibility, there is an exception in the case of venders of newspapers, books, or magazines, who, although they may in fact have disseminated the libel, did so innocently; their ignorance not being due to negligence. "A newspaper," it is said, "is not like a fire; a man may carry it about without being bound to suppose that it is likely to do an injury."⁴⁷ The rule has

⁴¹ See *supra*, p. 86.

⁴² *Elmer v. Fessenden*, 151 Mass. 359, 24 N. E. 208, 5 L. R. A. 724; *Schoepflin v. Coffey*, 162 N. Y. 12, 56 N. E. 502; *Youmans v. Smith*, 153 N. Y. 214, 47 N. E. 265; *Gough v. Goldsmith*, 44 Wis. 262, 28 Am. Rep. 579; *Ward v. Weeks*, 7 Bing. 211, 131 Eng. Repr. 81.

⁴³ *Davis v. Starrett*, 97 Me. 568, 55 Atl. 516; *Zier v. Hoffin*, 33 Minn. 66, 21 N. W. 862, 53 Am. Rep. 9; *Merchants' Ins. Co. v. Buckner*, 98 Fed. 222, 39 C. C. A. 19. And see *supra*, p. 88.

⁴⁴ See *Schoepflin v. Coffey*, 162 N. Y. 12, 56 N. E. 502; *Union Associated Press v. Heath*, 49 App. Div. 247, 63 N. Y. Supp. 96. In *Bassell v. Elmore*, 48 N. Y. 561, 564, it was also said that "if the slander be repeated under such circumstances as to be justifiable and innocent, and not to give a cause of action against the one repeating the same, then the first publisher thereof is generally responsible for the damage caused by such repetition."

⁴⁵ *Konkle v. Haven*, 140 Mich. 472, 103 N. W. 850; *Sylvia v. Miller*, 96 Tenn. 94, 33 S. W. 921; *Wilcox v. Moon*, 64 Vt. 450, 24 Atl. 244, 15 L. R. A. 760, 33 Am. St. Rep. 936.

⁴⁶ *Howland v. Blake Mfg. Co.*, 156 Mass. 543, 31 N. E. 656; *Shinglemeyer v. Wright*, 124 Mich. 230, 82 N. W. 887, 50 L. R. A. 129.

⁴⁷ *Emmons v. Pottle*, L. R. 16 Q. B. D. 354, 358, per Bowen, L. J. To the same effect, *Weldon v. Times Book Co., Ltd.*, 28 T. L. R. 143; *Vizetelly v. Mudie's Select Library, Ltd.*, [1900] 2 Q. B. 170, 69 L. J. Q. B. 645 (circulating library). Cf. *Smith v. Ashley*, 11 Metc. (Mass.) 367, 45 Am. Dec. 216.

been applied to telegraph companies,⁴⁸ and to one who merely transported the libel as a porter.⁴⁹

Construction of Language—Latent Defamation

It was at one time held that the language used was to be construed *in mitiori sensu*.⁵⁰ This led to absurd results,⁵¹ and the maxim is thoroughly exploded, so that words are now "to be taken in their natural meaning and according to common acceptance."⁵² Thus, where Horace Greeley, commenting upon an action brought by James Fenimore Cooper, the novelist, wrote, "He will not like to bring it in New York, for we are known here, nor in Otsego, for he is known there," the language was considered to bear out an inference that Cooper had a bad reputation in Otsego.⁵³ Either party may show that the hearers or readers did in fact give to the words a meaning different from that which they ordinarily bear. Hence language may be defamatory, though it assume the form of a question,⁵⁴ or insinuation,⁵⁵ or because it be ironical,⁵⁶ or contain a covert or hidden meaning.⁵⁷ So the defendant may es-

⁴⁸ The question here is whether the message is on its face susceptible of a libelous meaning. *Peterson v. Western Union Tel. Co.*, 65 Minn. 18, 67 N. W. 648, 33 L. R. A. 302.

⁴⁹ *Day v. Bream*, 2 Moo. & Rob. 55. Contra, if the delivery was by one aware of the contents. *Arnold v. Ingram*, 151 Wis. 438, 138 N. W. 111, Ann. Cas. 1914C, 976.

⁵⁰ In the milder sense.

⁵¹ As in *Holland v. Stoner*, Cro. Jac. 315, where the words were, "Thou didst set upon me by the highway and take my purse from me," and the court was of opinion that this did not charge a felonious taking of the purse, for "it may be he took it away in jest or for some other cause."

⁵² *Carroll v. White*, 33 Barb. (N. Y.) 615, 618, per Boakes, J. To the same effect, *Tuttle v. Bishop*, 30 Conn. 80; *Little v. Barlow*, 26 Ga. 423, 71 Am. Dec. 219; *Buckley v. O'Neil*, 113 Mass. 193, 18 Am. Rep. 466; *More v. Bennett*, 48 N. Y. 472; *Quist v. Kilchli*, 92 Minn. 160, 99 N. W. 642.

⁵³ *Cooper v. Greeley*, 1 Denio (N. Y.) 347.

⁵⁴ *State v. Norton*, 89 Me. 290, 36 Atl. 394; *Goodrich v. Davis*, 11 Metc. (52 Mass.) 473; *Gorham v. Ives*, 2 Wend. (N. Y.) 534.

⁵⁵ *Adams v. Lawson*, 17 Grat. (Va.) 250, 94 Am. Dec. 455.

⁵⁶ *BUCKSTAFF v. VIALI*, 84 Wis. 129, 54 N. W. 111, Chapin Cas. Torts, 164; *Boydell v. Jones*, 4 M. & W. 446.

⁵⁷ *Hanchett v. Chiatovich*, 101 Fed. 742, 41 C. C. A. 648.

tablish that reference is understood to have been made to a transaction innocent in itself, or which does not constitute the crime apparently imputed,⁵⁸ though the burden will be on him to do so.⁵⁹

It may therefore be that on its face the charge will appear to be both defamatory and to be directed against the plaintiff. On the other hand, its applicability or defamatory nature may be latent, and then extrinsic facts must be pleaded and proven, showing how and in what sense the matter was understood. Thus, where the article referred to a "celebrated surgeon of whisky memory" or a "noted steam doctor," plaintiff was denied recovery, where his complaint lacked allegations of facts which would establish identity in the minds of readers.⁶⁰ The same rule applies where the latency is as to the defamatory nature of the charge. Thus, a complaint is demurrable which merely sets forth a letter accusing plaintiff of having written anonymous letters. *Non constat* but that the letters were entirely innocent. If they were not, this fact should have been pleaded.⁶¹ Hence there must be set forth an *averment* or *inducement*, in which there is narrated "the extrinsic circumstances which, coupled with the language published, affects its construction and renders it actionable, where, standing alone, and not thus explained, the language would appear either not to concern the plaintiff, or, if concerning him, not to affect him injuriously." Then in the *colloquium* the plaintiff avers that the language published was concerning him, or concerning him and his affairs, or concerning him and the facts alleged as inducement. The *innuendo* follows, the office of which is to

⁵⁸ *Ayers v. Grider*, 15 Ill. 37; *Fawsett v. Clark*, 48 Md. 494, 30 Am. Rep. 481; *Van Rensselaer v. Dole*, 1 Johns. Cas. (N. Y.) 279; *Brown v. Myers*, 40 Ohio St. 99.

⁵⁹ See *Line v. Spies*, 139 Mich. 484, 102 N. W. 993; *Hayes v. Ball*, 72 N. Y. 418; *Hankinson v. Bilby*, 2 C. & K. 440.

⁶⁰ *Miller v. Maxwell*, 16 Wend. (N. Y.) 9.

⁶¹ *McNamara v. Goldan*, 194 N. Y. 315, 87 N. E. 440. To the same effect, *Outcault v. New York Herald Co.*, 117 App. Div. 534, 102 N. Y. Supp. 685; *Russell v. Barron*, 111 App. Div. 382, 97 N. Y. Supp. 1061.

aver a meaning of the language published.⁶² This is well illustrated in *Barham v. Nethersal*.⁶³ The words were, "Barham did burn my barn." Burning a barn, unless it had corn in it, was not a felony, so that, in order that this might have been considered a charge of committing felony, plaintiff, besides setting forth the words, should have alleged by way of *inducement* or *averment* that the defendant had a barn which was burned when it was full of corn. Then in the *colloquium* he should have stated that the words were uttered in a conversation relating to that barn. Then in his *innuendo* he would explain that thereby the defendant had meant to charge the plaintiff with burning a barn full of corn belonging to the defendant.⁶⁴ Further illustrations of latent defamation will be found in the note.⁶⁵

Now, as the purpose of an *innuendo* is to explain the meaning of the language used and to point out the defamatory sense in which it was understood, it is obvious that "it cannot be used to introduce new matter, or to enlarge the natural meaning of the words, and thereby give to the language a construc-

⁶² Townshend on Slander and Libel, §§ 308, 323, 335, quoted in *Squires v. State*, 39 Tex. Cr. R. 96, 105, 45 S. W. 147, 73 Am. St. Rep. 904.

⁶³ 2 Coke, 314.

⁶⁴ See *Van Vechten v. Hopkins*, 5 Johns. (N. Y.) 211, 4 Am. Dec. 339.

⁶⁵ To say of an unmarried woman that "she was in the habit of entertaining gentlemen callers at all hours of the night" was held not actionable. She might have done so for a proper purpose, and there was no allegation showing that this statement was understood as meaning that the plaintiff was unchaste. *Hemmens v. Nelson*, 138 N. Y. 517, 34 N. E. 342, 20 L. R. A. 440. To the same effect, *Snell v. Snow*, 13 Metc. (Mass.) 278, 46 Am. Dec. 730, where the words were "she is a bad girl." See, also, *Stitzell v. Reynolds*, 57 Pa. 488 (plaintiff "had her hogs in your corn and carried corn away"; imputation of a mere trespass, not larceny); *Hansbrough v. Stinnett*, 25 Grat. (Va.) 495 (plaintiff "killed my beef"; no felony imputed); *Stewart v. Minnesota Tribune Co.*, 41 Minn. 71, 42 N. W. 787 ("tax title shark"); *Crashley v. Press Publishing Co.*, 179 N. Y. 27, 71 N. E. 258, 1 Ann. Cas. 196 (charge of taking part in a revolt in Brazil; no allegation that this constituted a treasonable offense under Brazilian law; charge that plaintiff was "an Englishman of more or less indifferent repute" requires explanation).

tion which it will not bear. It is the duty of the court in all cases to determine whether the language used in the objectionable article could fairly and reasonably be construed to have the meaning imputed in the *innuendo*. If the words are not susceptible of the meaning ascribed to them by the plaintiff, and do not sustain the *innuendo*, the case should not be sent to the jury."⁶⁶ But, since language plainly defamatory requires no averment of extrinsic facts,⁶⁷ the plaintiff will not be prevented from recovering merely because he has assigned an unwarranted or nondefamatory meaning, for the averment of a defamatory meaning by innuendo is then surplusage.⁶⁸

Under the elaborate rules of common-law pleading, the declaration in an action for defamation was necessarily so artificial and prolix that justice was often "smothered in her own robes."⁶⁹ Important statutory changes have therefore been made in many states, which have established the rule that it is not necessary to allege extrinsic facts for the purpose of showing the application of the defamatory matter to plaintiff, who may state generally that it was published or spoken concerning him, and if that allegation is controverted he must establish it on the trial.⁷⁰

⁶⁶ *Naulty v. Bulletin Co.*, 206 Pa. 128, 134, 55 Atl. 862, per Mestrezat, J. To the same effect, *Gaither v. Advertiser Co.*, 102 Ala. 458, 14 South. 788; *Wallace v. Homestead Co.*, 117 Iowa, 348, 90 N. W. 835; *Kilgour v. Evening Star Newspaper Co.*, 96 Md. 16, 53 Atl. 716; *Adams v. Stone*, 131 Mass. 433; *Fleischmann v. Bennett*, 87 N. Y. 231; *Hofflund v. Journal Co.*, 88 Wis. 369, 60 N. W. 263.

⁶⁷ *Rhodes v. Naglee*, 66 Cal. 677, 6 Pac. 863; *More v. Bennett*, 48 N. Y. 472; *Benton v. State*, 59 N. J. Law, 551, 36 Atl. 1041; *Langton v. Hagerty*, 35 Wis. 150.

⁶⁸ *Curley v. Feeney*, 62 N. J. Law, 70, 40 Atl. 678; *Morrison v. Smith*, 177 N. Y. 366, 69 N. E. 725; *Adams v. Lawson*, 17 Grat. (Va.) 250, 94 Am. Dec. 455.

⁶⁹ *Harris v. Zanone*, 93 Cal. 59, 28 Pac. 845, per Harrison, J.

⁷⁰ Code Civ. Proc. N. Y. § 535. But, although the complaint contains a general allegation that the defamatory matter was published of and concerning plaintiff, the section will not aid him, where this general averment is contradicted and rendered nugatory by other allegations. Thus, where plaintiff alleged that her name was Kate Corr, that she was 28 years of age, a school-teacher, and had always borne a good character and reputation, a demurrer was sustained, where the article described an abandoned woman of 35 named Kittle

SLANDER—WHEN DAMAGE PRESUMED

70. In general, averment and proof of damage is essential to the maintenance of an action for defamation. But the charge may be of so grave a character that damage will be presumed. Slander *per se* exists where the matter: (1) Imputes the commission of a crime; (2) imputes the existence of a contagious or infectious disease; (3) tends to prejudice the party defamed in his office or calling. By statute in many states there has been added: (4) Imputations of unchastity.⁷¹

1. Charging Crime

There is great diversity of opinion as to the test to be applied to determine whether the language comes under

Carr, the daughter of a detective. It was held that it was apparent on the face of the complaint that the libelous words did not relate to the plaintiff. *Corr v. Sun Printing & Publishing Ass'n*, 177 N. Y. 131, 69 N. E. 288. To the same effect, *Fleischmann v. Bennett*, 87 N. Y. 231; *Fagan v. New York Evening Journal Pub. Co.*, 129 App. Div. 28, 113 N. Y. Supp. 62. Cf. *Slobodin v. Sun Printing & Publishing Ass'n*, 135 App. Div. 359, 120 N. Y. Supp. 386. But where the article is not defamatory on its face, and becomes such only by reason of extrinsic facts and circumstances, the plaintiff is not relieved from pleading and proving the latter. *Van Heusen v. Argenteau*, 194 N. Y. 309, 87 N. E. 437. For statutory rule in other states, see *Harris v. Zanone*, 93 Cal. 59, 28 Pac. 845; *Doan v. Kelley*, 121 Ind. 413, 23 N. E. 266; *Petsch v. Dispatch Printing Co.*, 40 Minn. 291, 41 N. W. 1034.

⁷¹ Statutory provisions in some states have broadened the scope of defamation *per se*. See Civ. Code Ga. 1895, § 3837, making it actionable to charge one orally with "being guilty of some debasing act which may exclude him from society." Cf. *Lewis v. Hudson*, 44 Ga. 568. Civ. Code La. art. 2315, provides that "every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." Hence its courts "are not bound by the technical distinctions of the common law as to words actionable *per se* and not actionable *per se*." *Spotorno v. Fourichon*, 40 La. Ann. 423, 424, 4 South. 71, per Fenner, J.; *Fellman v. Dreyfous*, 47 La. Ann. 907, 17 South. 422. In Mississippi (Code 1906, § 10; cf. *Crawford v. Mellon*, 12 Smedes & M. [Miss.] 328), Virginia (Code 1904, §

this head.⁷² After considerable fluctuation, the rule was finally announced in England that it was slander *per se* to say that plaintiff "has done something for which he can be made to suffer corporally."⁷³ American courts have stated the principle in varying phraseology. In a leading New York case it was said that "in case the charge, if true, will subject the party charged to an indictment for a crime involving moral turpitude or subject him to an infamous punishment, then the words will be in themselves actionable."⁷⁴ At common law

2897; cf. *Moseley v. Moss*, 6 Grat. [Va.] 534, and West Virginia (Code 1913, § 4406), words are made actionable which from their usual construction and common acceptance are considered as insults and tend to a breach of the peace.

⁷² In *BROOKER v. COFFIN*, 5 Johns. (N. Y.) 188, 192, 4 Am. Dec. 337, Chapin Cas. Torts, 157, speaking of imputations of crime, Spencer, J., observed: "There is not, perhaps, so much uncertainty in the law upon any subject."

⁷³ *WEBB v. BEAVAN*, 11 Q. B. D. 609, Chapin Cas. Torts, 156. It has frequently been asserted on the authority of *WEBB v. BEAVAN* that words imputing that plaintiff has been guilty of a crime punishable with imprisonment are actionable without proof of special damage. Burdick on Torts (3d Ed.) 352; Newell on Slander & Libel (3d Ed.) 111; Odgers on Libel & Slander (4th Ed.) 37. Here the words were: "I will lock you up in Gloucester gaol next week, I know enough to put you there." Pollock, B., who used the language quoted in the text, prefaced it with the remark that "the distinction seems a natural one, that words imputing that the plaintiff has rendered himself liable to the mere infliction of a fine are not slanderous"; and Lopes, J., who announced himself as of the same opinion, called attention to the fact that "a great number of offenses which were dealt with by indictment twenty years ago are now disposed of summarily," but he added, "The effect cannot be to alter the law with respect to actions for slander." It is difficult to understand how the error could have crept in. Surely, if I state that A. has committed a deliberate and premeditated murder, he will be under no necessity of proving special damage, though the punishment be death, and not imprisonment, unless the detention between the time of sentence and execution be regarded as such, which it certainly is not, being no part of the punishment, but merely incidental thereto. So, also, if I charge him with an offense for which he may be whipped. Cf. *Hellwig v. Mitchell*, [1910] L. R. 1 K. B. 609.

⁷⁴ *BROOKER v. COFFIN*, 5 Johns. (N. Y.) 188, 191, 4 Am. Dec. 337, Chapin Cas. Torts, 157; *Young v. Miller*, 3 Hill (N. Y.) 21; *Anonymous*, 60 N. Y. 262, 19 Am. Rep. 174, followed in *Berdeaux v. Davis*, 58 Ala. 611 (semble); *Ludlum v. McCuen*, 17 N. J. Law, 12;

the term "infamous" was applied to certain crimes, said to be treason, felony, and the *crimen falsi*, upon conviction of which a person became incompetent to testify as a witness, since he was deemed so depraved as to be altogether insensible to the obligation of an oath.⁷⁵ But as applied to slander *per se* the word is not to be taken in its technical, but in its popular, sense.⁷⁶ In such a case "importance is attached to the inherent nature of the indictable act, and also to the punishment which the law assigns to it, upon the principle that social degradation may result from either."⁷⁷ Other courts have thought that there should be an imputation of an indictable offense punishable corporally,⁷⁸ of a crime involving moral turpitude or subjecting the offender to an infamous punishment,⁷⁹ of a crime involving moral turpitude and subjecting the offender to corporal punishment,⁸⁰ of an indictable offense punishable by an infamous or corporal punishment, or which involves moral turpitude,⁸¹ of an offense subjecting the offender to a punishment involving disgrace, though not necessarily an ignominious punishment,⁸² of an indictable offense punish-

Johnson v. Shields, 25 N. J. Law, 116; Davis v. Carey, 141 Pa. 314, 21 Atl. 633; Pollard v. Lyon, 91 U. S. 225, 23 L. Ed. 308. In Wildrig v. Oyer, 13 Johns. (N. Y.) 124, counsel tried to induce the court to change "or" into "and," but without success.

⁷⁵ United States v. Block, 4 Sawy. 211, 212, Fed. Cas. No. 14,609.

⁷⁶ "There is a variety of misdemeanors, to the commission of which not even the shadow of disgrace is attached by the world, and to be accused of which would not be likely to induce the vexation of a prosecution if the accused were innocent, and if guilty he ought not to complain. I think it unreasonable that a charge of having committed a nuisance, assault and battery, and the like, should be held actionable." Andres v. Koppenhefer, 3 Serg. & R. (Pa.) 255, 258, 8 Am. Dec. 647, per Gibson, J.

⁷⁷ Davis v. Carey, 141 Pa. 314, 326, 21 Atl. 633, per Clark, J.

⁷⁸ Griffin v. Moore, 43 Md. 246; Shafer v. Ahalt, 48 Md. 171, 30 Am. Rep. 456; Birch v. Benton, 26 Mo. 153.

⁷⁹ Yakavicz v. Valentukевичious, 84 Conn. 350, 80 Atl. 94, Ann. Cas. 1912C, 1264; Shepherd v. Piper, 98 Me. 364, 57 Atl. 84; Geary v. Bennett, 53 Wis. 444, 10 N. W. 602.

⁸⁰ Redway v. Gray, 31 Vt. 292.

⁸¹ Wooten v. Martin, 140 Ky. 781, 131 S. W. 783, Ann. Cas. 1912B, 407.

⁸² Miller v. Parish, 8 Pick. (Mass.) 384; Brown v. Nickerson, 5 Gray (Mass.) 1.

able corporally, or by a disgraceful, though not necessarily ignominious, punishment,⁸³ or of an infamous offense whereof the conviction and punishment involves moral turpitude and social degradation.⁸⁴ Though the terms "moral turpitude" and "infamous" have been criticized as being of indefinite import, since "men may differ as to the quality of an act according to their own standard of morality,"⁸⁵ it is submitted that their inclusion has promoted substantial justice and that their application may safely be left to the common sense of the courts.

It is not slander *per se* to say that one intends or is about to commit a crime. The language must relate to his conduct or character, past or present—that is, something which is actual, instead of merely imaginary or conjectural.⁸⁶ But to say that one has attempted to commit a crime may be actionable where such attempt is itself made criminal,⁸⁷ and since the obloquy remains, it will be slander *per se* to assert that a crime was committed, though the words import that punishment was suffered therefor,⁸⁸ or a pardon issued,⁸⁹ or prosecution is barred by the statute of limitations.⁹⁰

It has been seen that, although the imputation is *prima facie* defamatory, the defendant may show that it was understood in a nondefamatory sense. *A fortiori* there can be no slander *per se* when the accompanying language shows that no criminal act was charged, as if the words were "You are a thief; you have stolen my land," for land cannot be the subject of larceny.⁹¹

⁸³ Blake v. Smith, 19 R. I. 476, 34 Atl. 995.

⁸⁴ McKee v. Wilson, 87 N. C. 300.

⁸⁵ Birch v. Benton, 26 Mo. 153, 159.

⁸⁶ FANNING v. CHACE, 17 R. I. 388, 22 Atl. 275, 13 L. R. A. 134, 33 Am. St. Rep. 878, Chapin Cas. Torts, 158; Mitchell v. Sharon (C. C.) 51 Fed. 424.

⁸⁷ Berdeaux v. Davis, 58 Ala. 611; Filber v. Dautermann, 26 Wis. 518.

⁸⁸ Fowler v. Dowdney, 2 Moo. & R. 119 ("he is a returned convict"); Krebs v. Oliver, 12 Gray (Mass.) 239 (he "was imprisoned many years in a penitentiary in Germany for larceny").

⁸⁹ Boston v. Tatam, Cro. Jac. 623.

⁹⁰ See Van Ankin v. Westfall, 14 Johns. (N. Y.) 233.

⁹¹ See Ogden v. Riley, 14 N. J. Law, 186, 25 Am. Dec. 513 ("you are a thief; you have stolen my marle"). To the same effect, Norton

2. Charging Disease

Though it is sometimes broadly stated that it is slander *per se* to charge one with having a contagious or infectious disease which would tend to exclude him from society, yet "the only examples which adjudged cases furnish are of the plague, leprosy, and venereal disorders."⁹² The imputation must be that one is suffering from these diseases at the present time—not that he has previously suffered; "for it is avoiding him for fear of contagion and refusing to keep him company that is the legal notion of damage, and when he is cured those inconveniences will not attend him."⁹³

3. Prejudice to Calling—Unfitness to Hold Office

The third class includes cases where the words have a natural tendency to injure the party in his profession, trade, or calling.⁹⁴ Thus it will be actionable, though special damage be not averred or proved, to say of a physician that he is no good, only a butcher, and that the speaker would not have him for a dog,⁹⁵ to call a lawyer a cheat,⁹⁶ to assert that a school-teacher dismissed the boys, kept the girls

v. Ladd, 5 N. H. 203, 20 Am. Dec. 573; *Dexter v. Taber*, 12 Johns. (N. Y.) 239; *Barnes v. Crawford*, 115 N. C. 76, 20 S. E. 386; *Jackson v. Adams*, 2 Bing. N. C. 402; *Lemon v. Simmons*, 57 L. J. Q. B. 260.

⁹² *COUNT JOANNES v. BURT*, 6 Allen (Mass.) 236, 83 Am. Dec. 625, *Chapin Cas. Torts*, 160, per Hoar, J., holding that an oral imputation of insanity was not slander *per se*. See, further, *McDonald v. Nugent*, 122 Iowa, 651, 98 N. W. 506 (venereal disease); *Williams v. Holdredge*, 22 Barb. (N. Y.) 396 (venereal disease); *Smith v. Hobson, Style*, 112 (venereal disease); *Taylor v. Perkins*, *Cro. Jac.* 144 (leprosy).

⁹³ *Taylor v. Hall*, 2 Str. 1189. To the same effect, *Bruce v. Soule*, 69 Me. 562.

⁹⁴ *Blumhardt v. Rohr*, 70 Md. 328, 17 Atl. 266; *Ostrom v. Calkins*, 5 Wend. (N. Y.) 263; *Hayner v. Cowden*, 27 Ohio St. 292, 22 Am. Rep. 303; *Singer v. Bender*, 64 Wis. 169, 24 N. W. 903.

⁹⁵ *Cruikshank v. Gordon*, 118 N. Y. 178, 23 N. E. 457. To the same effect, *Johnson v. Robertson*, 8 Port. (Ala.) 486; *De Pew v. Robinson*, 95 Ind. 109; *SECOR v. HARRIS*, 18 Barb. (N. Y.) 425, *Chapin Cas. Torts*, 161.

⁹⁶ *Rush v. Cavanaugh*, 2 Pa. 187. To the same effect, *Mains v. Whiting*, 87 Mich. 172, 49 N. W. 559.

in, gave them candy, and courted them,⁹⁷ to charge with insolvency one whose business requires that he be given financial credit and accommodation,⁹⁸ or in fact to impute to any one fraud or want of integrity,⁹⁹ or of capacity in his calling,¹⁰⁰ or misconduct therein.¹⁰¹ This is likewise true of words spoken of the holder of an office which impute to him misconduct therein or lack of capacity therefor. Thus it is slander *per se* to charge that a sheriff used his official position to protect a certain disorderly house in his county,¹⁰² or that the chief engineer of a fire department was drunk at a fire.¹⁰³ It is difficult to perceive why there should be any distinction between offices of honor and of profit, though it has been said that, unless the imputed unfitness for the former be of such a character as to justify removal, the charge will not be deemed slander *per se*.¹⁰⁴ But

⁹⁷ *Spears v. McCoy*, 155 Ky. 1, 159 S. W. 610, 49 L. R. A. (N. S.) 1033. To the same effect, *Bray v. Callihan*, 155 Mo. 43, 55 S. W. 865; *Fitzgerald v. Young*, 89 Neb. 693, 132 N. W. 127; *Darling v. Clement*, 69 Vt. 292, 37 Atl. 779.

⁹⁸ *Lewis v. Hawley*, 2 Day (Conn.) 495, 2 Am. Dec. 121; *Fred v. Traylor*, 115 Ky. 94, 72 S. W. 768; *Sewall v. Catlin*, 3 Wend. (N. Y.) 291; *Phillips v. Hoefler*, 1 Pa. 62, 44 Am. Dec. 111; *Jones v. Littler*, 7 Mees. & W. 423.

⁹⁹ *Nelson v. Borchanius*, 52 Ill. 236; *Noeninger v. Vogt*, 88 Mo. 589; *Joralemon v. Pomeroy*, 22 N. J. Law, 271; *Fowles v. Bowen*, 30 N. Y. 20.

¹⁰⁰ *De Pew v. Robinson*, 95 Ind. 109; *Fitzgerald v. Redfield*, 51 Barb. (N. Y.) 484; *Id.*, 36 How. Prac. (N. Y.) 97; *Hellstern v. Katzer*, 103 Wis. 391, 79 N. W. 429. The general rule is that words are not actionable in themselves which merely charge ignorance or mismanagement with reference to a particular case. *Camp v. Martin*, 23 Conn. 86. It is otherwise when they fairly imply general want of skill or knowledge, though one instance only be cited. *Sumner v. Utley*, 7 Conn. 257; *Jones v. Diver*, 22 Ind. 184; *SECOR v. HARRIS*, 18 Barb. (N. Y.) 425, *Chapin Cas. Torts*, 161.

¹⁰¹ *Ritchie v. Widdemer*, 59 N. J. Law, 290, 35 Atl. 825; *Burtch v. Nickerson*, 17 Johns. (N. Y.) 217, 8 Am. Dec. 390; *Gross Coal Co. v. Rose*, 126 Wis. 24, 105 N. W. 225, 2 L. R. A. (N. S.) 741, 110 Am. St. Rep. 894, 5 Ann. Cas. 549.

¹⁰² *Heller v. Duff*, 62 N. J. Law, 101, 40 Atl. 691.

¹⁰³ *Gottbehuet v. Hubachek*, 36 Wis. 515. To the same effect, *Craig v. Brown*, 5 Blackf. (Ind.) 44; *Hook v. Hackney*, 16 Serg. & R. (Pa.) 385; *Spiering v. Andrae*, 45 Wis. 330, 30 Am. Rep. 744.

¹⁰⁴ "It is quite clear that, as regards a man's business or profes-

whether the ground of the action be that the party is disgraced or injured in his profession, trade, or office, or exposed to the hazard of losing the latter in consequence of the slanderous words, it is evident that, his general reputation and standing in the community not being involved, it must appear that when the slander was uttered he was engaged in such employment or that his term of office had not expired.¹⁰⁸

It is at times difficult to determine whether the words do in fact touch upon one in his profession, trade, or office, that is, whether they have such close reference thereto that they can be said to constitute an imputation upon him in that character rather than upon him as an individual, for it must be noted that it is not essential that the defendant should

slon or office, if it be an office of profit, the mere imputation of want of ability to discharge the duties of that office is sufficient to support an action. It is not necessary that there should be imputation of immoral or disgraceful conduct. * * * It must be either something said of him in his office or business which may damage him in that office or business, or it must relate to some quality which would show that he is a man, who by reason of his want of ability or honesty is unfit to hold the office. So much with regard to offices of profit; the reason being that in all those cases the court will presume, or perhaps I should say the law presumes, such a probability of pecuniary loss from such imputation in that office or employment, or profession, that it will not require special damage to be shown. * * * But when you come to offices that are not offices of profit, the loss of which, therefore, would not involve necessarily a pecuniary loss, the law has been differently laid down, and it is quite clear that the mere imputation of want of ability or capacity, which would be actionable if made in the case of a person holding an office of profit, is not actionable in the case of a person holding an office which has been called an office of credit or an office of honor. * * * Where the imputation is an imputation, not of misconduct in an office, but of unfitness for an office, and the office for which the person is said to be unfit is not an office of profit, but one merely of what has been called honor or credit, the action will not lie, unless the conduct charged be such as would enable him to be removed from or deprived of that office." *Alexander v. Jenkins* (1892) L. R. 1 Q. B. 797, 800, per Herschell, L. C. Cf. *Booth v. Arnold* (1895) L. R. 1 Q. B. 571, 576.

¹⁰⁸ *Harris v. Burley*, 8 N. H. 216; *Forward v. Adams*, 7 Wend. (N. Y.) 204; *Cassavoy v. Pattison*, 93 App. Div. 370, 87 N. Y. Supp. 658; *McKee v. Wilson*, 87 N. C. 300; *Gibbs v. Price, Style*, 231. But contra if written, see *infra*, p. 316.

expressly have named the office or calling. It is sufficient that plaintiff's professional, trade, or official reputation must necessarily be affected.¹⁰⁶ Some of the cases have gone very far in denying a cause of action. Thus it was considered that the statement that a clerk was unfit to hold his situation because of lascivious conduct was not actionable, owing to lack of damage, because it "does not imply the want of any of those qualities which a clerk ought to possess, and because the imputation has no reference to his conduct as clerk."¹⁰⁷ Now it is evident that the same words may be slander *per se* when spoken of the members of one calling, but not when applied to others. Charges of insolvency, illiteracy, or cowardice, for instance, might or might not be actionable in themselves, depending upon whether the subject was a trader, teacher, or soldier.¹⁰⁸ General imputations of intemperance and sexual immorality surely have a natural tendency to injure clergymen, physicians, and teachers,¹⁰⁹ but whether this can be held to apply to other callings, and, if so, to what extent, is in doubt. On the one hand, it can be urged that evil habits are properly regarded as entailing a lack of efficiency to a greater or less degree in every employment;¹¹⁰ on the other, that

¹⁰⁶ See *Fred v. Traylor*, 115 Ky. 94, 97, 72 S. W. 768.

¹⁰⁷ *Lumby v. Allday*, 1 Comp. & J. 301. Here the words were: "You are a fellow, a disgrace to the town, unfit to hold your situation for your conduct with whores. I will have you in the 'Argus.' You have bought up all the copies of the 'Argus,' knowing you have been exposed. You may drown yourself, for you are not fit to live and are a disgrace to the situation you hold."

¹⁰⁸ *Winsette v. Hunt* (Ky.) 53 S. W. 522; *Rathbun v. Emigh*, 6 Wend. (N. Y.) 407; *Darling v. Clement*, 69 Vt. 292, 37 Atl. 779.

¹⁰⁹ See *Nicholson v. Dillard*, 137 Ga. 225, 73 S. E. 382; *Chaddock v. Briggs*, 13 Mass. 248, 7 Am. Dec. 137, note; *Hayner v. Cowden*, 27 Ohio St. 292, 22 Am. Rep. 303; *McMillan v. Birch*, 1 Bin. (Pa.) 178, 2 Am. Dec. 426, note; *Darling v. Clement*, 69 Vt. 292, 37 Atl. 779. But see *Anonymous*, 1 Ohio, 83, note; *Ayre v. Craven*, 2 Adol. & El. 2; *Gallwey v. Marshall*, 9 Exch. 294; *Tighe v. Wicks*, 33 Up. Can. Q. B. 479.

¹¹⁰ Cf. *Sanderson v. Caldwell*, 45 N. Y. 401, 6 Am. Rep. 105, where, speaking of a libelous charge that an attorney prosecuted his business in his sober moments, it was observed (45 N. Y. 404, 6 Am. Rep. 110) that this "authorized the inference that he was in the

a failure to draw the line with some strictness would be to make the present class in some respects all-inclusive, or at the best would promote unwarrantable speculation.¹¹¹ It would seem that no definite rule can be laid down, and that each case must rest largely upon its particular facts.¹¹² Further illustrations of the general principle will be found in the note.¹¹³

habit of the immoderate use of intoxicating liquors; and the natural tendency and result of such a habit, in a person engaged in any business, and especially in a professional business, is to unfit him for the proper discharge of it."

¹¹¹ Still, where the words, as in *Lumby v. Allday*, *supra*, not only impute lack of a general moral quality which is no more requisite for the exercise of plaintiff's calling than for hundreds of others, but in addition it is expressly stated that by reason thereof—i. e., that the evil propensities have been indulged to such an extent that plaintiff is not fit to hold his position, his case is greatly strengthened. Nevertheless, even here it is clear that the conclusion drawn by the defendant may be obviously unwarranted, as if it should be asserted that a physician had taken a single glass of wine at a dinner and therefore was unfit to practice medicine. But it should be fully apparent that the conclusion cannot be drawn. For instance, a publication in which it was asserted that dancing was taught in a certain school, and that therefore its administration was harmful to the moral and religious interests of the community, was properly, it is submitted, held actionable without proof of special damage. *St. James Military Academy v. Gaiser*, 125 Mo. 517, 28 S. W. 851, 28 L. R. A. 667, 46 Am. St. Rep. 502.

¹¹² Cf. *Nelson v. Borchanius*, 52 Ill. 236; *Buck v. Hersey*, 31 Me. 558; *Fitzgerald v. Robinson*, 112 Mass. 371; *Ireland v. McGarvish*, 3 N. Y. Super. Ct. 155; *Broughton v. McGrew* (C. C.) 39 Fed. 672, 5 L. R. A. 406.

¹¹³ In the following the imputation was deemed defamatory without proof of special damage: *Broughton v. McGrew* (C. C.) 39 Fed. 672, 5 L. R. A. 406 (charge of drunkenness; plaintiff was general manager and assistant vice president of a railroad); *Pemberton v. Colls*, 10 Q. B. 461, 16 L. J. Q. B. 403, 11 Jur. 1011 (charge that a clergyman had drugged another clergyman and thereby obtained his signature to a bill). Contra: To say of a bank cashier that he was an "Irish bull head," *Clavin v. Froelich*, 162 Ill. App. 50; "Squire Oakley is a damned rogue" (plaintiff was a justice of the peace), *Oakley v. Farrington*, 1 Johns. Cas. (N. Y.) 129, 1 Am. Dec. 107; to accuse a physician with being a "white capper," *Divens v. Meredith*, 147 Ind. 693, 47 N. E. 143; to write and publish that a certain pamphlet, the work of a lawyer and author of a text-book on

4. *Charging Unchastity*

At common law an oral charge of unchastity was not actionable, without averment and proof of special damage pecuniary in its nature, and not consisting merely of the mental anguish or loss of the society of friends and neighbors which would naturally ensue.¹¹⁴ But in England¹¹⁵ and in many states in this country a statutory cause of action is now given to the female.¹¹⁶ In others it is given to both sexes,¹¹⁷ or such a charge is held to impute a crime under legislation punishing fornication or adultery.¹¹⁸

patent law, was "the effusion of a crank," *Walker v. Tribune Co.* (C. C.) 29 Fed. 827; to say that a stone mason was a "ringleader of the nine hours system," *Miller v. David* (1874) L. R. 9 C. P. 118, 30 L. T. N. S. 58. Cf. *Doyley v. Roberts*, 3 Bing. N. C. 835, 3 Hodges, 154, 6 L. J. C. P. 279, 5 Scott, 40, 32 E. C. L. 384, where the words were: "He has defrauded his creditors and has been horsewhipped off the course at Doncaster." Jury found that they were not spoken of plaintiff in his character of attorney.

¹¹⁴ *Shafer v. Ahalt*, 48 Md. 171, 30 Am. Rep. 456; *Bassell v. Elmore*, 48 N. Y. 561; *Terwilliger v. Wands*, 17 N. Y. 54, 72 Am. Dec. 420; *Davies v. Gardiner*, Pop. 36; *Allsop v. Allsop*, 5 Hurl. & N. 534. Up to 1855 a nominal remedy was given in the ecclesiastical courts, which could inflict penance on the defendant for the good of his soul, but could award no damages to plaintiff. *Oggers on Libel & Slander* (4th Ed.) 67.

¹¹⁵ *Slander of Women Act*, 54 & 55 Vict. c. 51, passed in 1891.

¹¹⁶ E. g., Code Pub. Gen. Laws Md. 1904, art. 88, §§ 1-4; Comp. Laws Mich. 1897, § 10401; Code Civ. Proc. N. Y. § 1906; *Pell's Revisal* N. C. 1908, § 2015.

¹¹⁷ E. g., Civ. Code Cal. § 46, subd. 4; *Hurds' Rev. Stats.* Ill. 1909, c. 126, § 1; *Rev. St. Mo.* 1909, § 5424.

¹¹⁸ *Page v. Merwin*, 54 Conn. 426, 8 Atl. 675; *Patterson v. Wilkinson*, 55 Me. 42, 92 Am. Dec. 568; *Noyes v. Hall*, 62 N. H. 594; *Mayer v. Schlechter*, 29 Wis. 646. See *Joralemon v. Pomeroy*, 22 N. J. Law, 271.

LIBEL—WHEN DAMAGE PRESUMED

71. Matter addressed to the eye, which is calculated to bring one into hatred, contempt, ridicule, or obloquy, to cause him to be shunned or avoided, or to injure him in his office or calling, is libelous, and actionable, without averment or proof of special damage.¹¹⁹

It is evident that all imputations constituting slander *per se* are libelous, without proof of special damage, if addressed to the eye.¹²⁰ But libel is much broader in scope, since it embraces matter which exposes to hatred, contempt, ridicule, or obloquy.¹²¹ It is enough that "the necessary effect of what was stated respecting the plaintiff is to injure his reputation and lower him in the esteem and opinion of the community."¹²² "Much," it has been said, "which if only spoken might be passed by as idle blackguardism, doing no discredit save to him who utters it, when invested with the

¹¹⁹ Cf. *Iron Age Pub. Co. v. Crudup*, 85 Ala. 519, 5 South. 332; *Prosser v. Callis*, 117 Ind. 105, 19 N. E. 735; *Hetherington v. Sterry*, 28 Kan. 426, 42 Am. Rep. 169; *Colby v. Reynolds*, 6 Vt. 489, 27 Am. Dec. 574.

¹²⁰ Imputing crime: *Iron Age Pub. Co. v. Crudup*, 85 Ala. 519, 5 South. 332; *Cook v. Globe Printing Co. of St. Louis*, 227 Mo. 471, 127 S. W. 332; *Ramsey v. Cheek*, 109 N. C. 270, 13 S. E. 775; *Cochran v. Melendy*, 59 Wis. 207, 18 N. W. 24. Disease: *Simpson v. Press Pub. Co.*, 33 Misc. Rep. 228, 67 N. Y. Supp. 401 (leprosy); *Villers v. Monsley*, 2 Wils. K. B. 403 (leprosy; semble). Misconduct in or lack of capacity for profession, business, or office: *Hetherington v. Sterry*, 28 Kan. 426, 42 Am. Rep. 169; *Bornmann v. Star Co.*, 174 N. Y. 212, 66 N. E. 723; *Mattice v. Wilcox*, 147 N. Y. 624, 42 N. E. 270; *O'Brien v. Times Publishing Co.*, 21 R. I. 256, 43 Atl. 101.

¹²¹ *Cerveny v. Chicago Daily News Co.*, 139 Ill. 345, 23 N. E. 692, 13 L. R. A. 864; *Prosser v. Callis*, 117 Ind. 105, 19 N. E. 735; *Hand v. Winton*, 38 N. J. Law, 122; *Cady v. Brooklyn Union Pub. Co.*, 23 Misc. Rep. 409, 51 N. Y. Supp. 198; *Winchell v. Argus Co.*, 69 Hun, 354, 23 N. Y. Supp. 650; *Simmons v. Morse*, 51 N. C. 6; *Colby v. Reynolds*, 6 Vt. 489, 27 Am. Dec. 574; *BUCKSTAFF v. VIALI*, 84 Wis. 129, 54 N. W. 111, *Chapin Cas. Torts*, 164. *Pftzinger v. Dubs*, 64 Fed. 696, 12 C. C. A. 399.

¹²² *Williams v. Godkin*, 5 Daly (N. Y.) 499, 502.

dignity of print, is capable by reason of its permanent character and wide dissemination of inflicting serious injury,"¹²² and, although it has at times been questioned whether this distinction rests upon a sound basis,¹²⁴ it is nevertheless fully established. Hence epithets or expressions which, if orally uttered, would require averment and proof of damage, may constitute libel, though such averment and proof be lacking, e. g., an "itchy old toad,"¹²⁵ a "villain,"¹²⁶ a "rascal,"¹²⁷ a "liar,"¹²⁸ a "hoary-headed ficher,"¹²⁹ a "cowardly snail,"¹³⁰ a "swindler,"¹³¹ or a

¹²² *Tillson v. Robbins*, 68 Me. 295, 296, 28 Am. Rep. 50, per Barrows, J. Cf. *Iron Age Pub. Co. v. Crudup*, 85 Ala. 519, 520, 5 South. 382.

¹²⁴ "So it has been argued that writing shows more deliberate malignity; but the same answer suffices, that the action is not maintainable upon the ground of the malignity, but for the damage sustained. So it is argued that written scandal is more generally diffused than words spoken, and is therefore actionable; but an assertion made in a public place, as upon the Royal Exchange, concerning a merchant in London, may be much more extensively diffused than a few printed papers dispersed, or a private letter. It is true that a newspaper may be very generally read, but that is all casual." *Thorley v. Lord Kerry*, 4 Taunt. 355, 365, per Mansfield, C. J. Cf. *Herrick v. Tribune Co.*, 108 Ill. App. 244; *Colby v. Reynolds*, 6 Vt. 489, 27 Am. Dec. 574.

¹²⁵ *Villers v. Monsley*, 2 Wils. K. B. 403.

¹²⁶ *Bell v. Stone*, 1 Bos. & Pul. 331. Cf. *Browne v. Hawkins*, Y. B. 17 Edw. IV, fol. 3, pl. 2.

¹²⁷ See *Williams v. Karnes*, 4 Humph. (Tenn.) 9. But "villain," "rascal," and "cheater" may be slander *per se*, if spoken with reference to plaintiff in his trade. *Nelson v. Borchenius*, 52 Ill. 236.

¹²⁸ *Lindley v. Horton*, 27 Conn. 58; *Hake v. Brames*, 95 Ind. 161; *Rider v. Rulison*, 74 Hun, 239, 29 N. Y. Supp. 234; *Colby v. Reynolds*, 6 Vt. 489, 27 Am. Dec. 574. Aliter, when oral. *Kimmis v. Stiles*, 44 Vt. 351.

¹²⁹ *Crocker v. Hadley*, 102 Ind. 416, 1 N. E. 734.

¹³⁰ *Price v. Whitely*, 50 Mo. 439. Here plaintiff was also referred to as an "imp of the devil," but the court says that this phrase "in itself has no specific meaning, but is a mere term of reproach," and "receives point and takes chiefly its libelous character from the allegation that as imp of the devil he sat in the mayor's seat." *Sed quare*.

¹³¹ *Klinck v. Colby*, 46 N. Y. 427, 7 Am. Rep. 360; *J'Anson v. Stuart*, 1 T. R. 1357; *Zierenberg v. Labouchere*, [1893] 2 Q. B. 183. But not slander *per se*. *Stevenson v. Hayden*, 2 Mass. 406; *Kuhne*

charge that one not a clergyman was a hypocrite and used the cloak of religion for unworthy purposes.¹³² Imputations of unchastity, it is submitted, furnish another illustration;¹³³ also charges of misconduct in office, published after the official term has expired.¹³⁴ Other illustrations are given in the note.¹³⁵

DEFAMATION WITH SPECIAL DAMAGE

72. If the matter be defamatory, and cannot be placed in any of the classes already described, there must be averment and proof of special damage.¹³⁶

v. Ahlers, 45 Misc. Rep. 454, 92 N. Y. Supp. 41; Chase v. Whitlock, 8 Hill (N. Y.) 139; Savile v. Jardine, 2 H. Bl. 531. Unless spoken of one in his office or calling. Forrest v. Hanson, 1 Cranch, C. C. 63, Fed. Cas. No. 4,943. See Neal v. Lewis, 2 Bay (S. C.) 204, 1 Am. Dec. 640.

¹³² Thorley v. Lord Kerry, 4 Taunt. 355.

¹³³ Not slander *per se* at common law. See *supra*, p. 312. But libelous, though damage not shown. More v. Bennett, 48 N. Y. 472. See Cady v. Brooklyn Union Pub. Co., 23 Misc. Rep. 409, 411, 51 N. Y. Supp. 198.

¹³⁴ Russell v. Anthony, 21 Kan. 450, 30 Am. Rep. 436; Cramer v. Riggs, 17 Wend. (N. Y.) 209.

¹³⁵ Herrick v. Tribune Co., 108 Ill. App. 244; Morey v. Morning Journal Ass'n, 123 N. Y. 207, 25 N. E. 161, 9 L. R. A. 621, 20 Am. St. Rep. 730. A charge that a white man is a negro is libelous. Upton v. Times-Democrat Pub. Co., 104 La. 141, 28 South. 970; Flood v. News & Courier Co., 71 S. C. 112, 50 S. E. 637, 4 Ann. Cas. 635. But not slander *per se*, McDowell v. Bowles, 53 N. C. 184; Williams v. Riddle, 145 Ky. 459, 140 S. W. 661, 36 L. R. A. (N. S.) 974, Ann. Cas. 1913B, 1151. So of imputations of insanity, Selp v. Deshler, 170 Pa. 334, 32 Atl. 1032 (written); JOANNES v. BURT, 6 Allen (88 Mass.) 236, 83 Am. Dec. 625, Chapin Cas. Torts, 160 (oral); and illegitimacy, Shelby v. Sun Printing & Publishing Ass'n, 38 Hun (N. Y.) 474, affirmed 109 N. Y. 611, 15 N. E. 895 (written); Hoar v. Ward, 47 Vt. 657 (oral). It has been held, however, that spoken words imputing illegitimacy were actionable *per se*, as tending to produce disherison, and that it was unnecessary to establish that the party had in fact been disinherited. Humphreys v. Stanfield, Cro. Car. 469.

¹³⁶ Studdard v. Trucks, 31 Ark. 726; Wilson v. Cottman, 65 Md. 190, 3 Atl. 890; Doyle v. Kirby, 184 Mass. 409, 68 N. E. 843; Barnes v. Trundy, 31 Me. 321; Flatow v. Von Bremsen (City Ct.) 11 N. Y.

The special damage must have been of a pecuniary nature, since, as has been seen,¹³⁷ mere mental pain or suffering will not suffice. Furthermore, it will not be enough that damage has in fact been caused, unless it appears to be the foreseeable consequence of the publication.¹³⁸ But suppose the matter is not defamatory in its nature? It is said that a charge of having done that which one may lawfully do, e. g., successfully invoked the statute of limitations when called upon to pay a just debt,¹³⁹ is actionable, when special damage is established, though otherwise it is not.¹⁴⁰ True, in the cases just cited, the acts charged may be deemed morally censurable, but there seems no reason why recovery should be denied where even this element is lacking, provided defendant knew or should have known that his lie would result in damage to plaintiff, and such damage did in fact follow, though the action must necessarily be on the case, and not for slander or libel.¹⁴¹ Suppose that, during the present European war, I should falsely tell an employer, whose sympathies were strongly with the Germans, that one of his employes had contributed to a fund for the

Supp. 680; *Pollard v. Lyon*, 91 U. S. 225, 23 L. Ed. 308; *Walker v. Tribune Co. (C. C.)* 29 Fed. 827.

¹³⁷ See *supra*, p. 83.

¹³⁸ *Georgia v. Kepford*, 45 Iowa, 48; *Field v. Colson*, 93 Ky. 347, 20 S. W. 264; *Baldwin v. Walser*, 41 Mo. App. 243 (libel); *Anonymous*, 60 N. Y. 262, 19 Am. Rep. 174; *Gough v. Goldsmith*, 44 Wis. 262, 28 Am. Rep. 579; *Miller v. David*, L. R. 9 C. P. 118, 30 L. T. N. S. 58; *Vicars v. Wilcocks*, 8 East, 1.

¹³⁹ *Hollenbeck v. Ristine*, 105 Iowa, 488, 75 N. W. 355, 67 Am. St. Rep. 306; *Bennett v. Williamson*, 6 N. Y. Super. Ct. 60.

¹⁴⁰ *Donaghue v. Gaffy*, 53 Conn. 43, 2 Atl. 397; *Watters & Son v. Retail Clerks' Union No. 479*, 120 Ga. 424, 47 S. E. 911; *Homer v. Engelhardt*, 117 Mass. 539; *Foot v. Pitt*, 83 App. Div. 76, 82 N. Y. Supp. 464; *Zinserling v. Journal Co.*, 26 Misc. Rep. 591, 57 N. Y. Supp. 905; *Goldberger v. Philadelphia Grocer Pub. Co. (C. C.)* 42 Fed. 42.

¹⁴¹ Cf. *Hollenbeck v. Ristine*, 105 Iowa, 488, 75 N. W. 355, 67 Am. St. Rep. 306; *Lombard v. Lennox*, 155 Mass. 70, 28 N. E. 1125, 81 Am. St. Rep. 528; *Morasse v. Brochu*, 151 Mass. 567, 25 N. E. 74, 8 L. R. A. 524, 21 Am. St. Rep. 474; *Reid v. Providence Journal Co.*, 20 R. I. 120, 37 Atl. 637; *Reynolds v. Bentley*, 1 McM. (S. C.) 16, 38 Am. Dec. 251. Contra, *Knight v. Blackford*, 3 Mackey (14 D. C.) 177, 51 Am. Rep. 772.

relief of distressed Belgians, and I knew at the time that dismissal would follow. Here a praiseworthy act is charged, and yet would not the dismissed employé have a cause of action against me?¹⁴²

It has already been seen that it is not essential that the hearer or reader should think that the imputation is false.¹⁴³ This is true, likewise, when special damage is caused by the act of a third party, as where an employer, though not believing the charge, nevertheless dismissed the employé. A contrary rule would require too fine a speculation on motives, and "would often put it in the power of an unwilling witness to determine a case against the plaintiff." Besides, "it may often happen that a person may not believe what is told, and yet not have courage to keep the individual who labors under the imputation."¹⁴⁴

Where it is necessary to allege special damage, the items of the loss or injury must be distinctly stated. A mere *ad damnum* clause is not the equivalent of such an averment.¹⁴⁵

¹⁴² But in *Kelly v. Partington*, 5 Barn. & Adol. 646, Littledale, J., asked (page 648): "Suppose a man had a relation of a penurious disposition, and a third person, knowing that it would injure him in the opinion of that relation, tells the latter a generous act which the first has done, by which he induces the relation not to leave him money, would that be actionable?" To this the Solicitor General (Sir John Campbell) answered: "If the words were spoken falsely with intent to injure, they would be actionable." Evidently the court did not agree. Recovery was here denied where defendant had said that plaintiff, a shop woman, "secreted 1s. 6d. under the till," and added, "These are not times to be robbed," though it was alleged that by reason thereof one Stenning had refused to take plaintiff into his service. Denman, C. J., observed: "The words do not of necessity import anything injurious to the plaintiff's character, and we think that the judgment must be arrested, unless there is something on the face of the declaration from which the court can clearly see that the slanderous matter is injurious to the plaintiff." Cf. *Terwilliger v. Wands*, 17 N. Y. 54, 61, 72 Am. Dec. 420.

¹⁴³ See *supra*, p. 298.

¹⁴⁴ *Knight v. Gibbs*, 1 Adol. & El. 43, per Lord Denman, C. J. *Contra*, Anonymous, 60 N. Y. 262, 19 Am. Rep. 174 (semble).

¹⁴⁵ *Watters & Son v. Retail Clerks' Union*, No. 479, 120 Ga. 424, 47 S. E. 911; *Smid v. Bernard*, 31 Misc. Rep. 35, 63 N. Y. Supp. 278; *Hallock v. Miller*, 2 Barb. (N. Y.) 630; *Railroad v. Delaney*, 102

COMPLETE DEFENSES

73. Defenses may be complete or partial. Of the former there will be considered: (1) The truth, (2) Fair comment, (3) Privilege.

1. Truth

In a civil action for defamation it was a settled principle of the common law that no recovery could be had where there was no falsehood, and it mattered not what motive might have actuated the defendant.¹⁴⁰ It was generally conceded, however, though it has been vigorously denied, that in a criminal prosecution the truth might not be given in evidence, however honorable and praiseworthy the motives of the publisher. Hence originated the familiar maxim, "The greater the truth the greater the libel"¹⁴¹—a strange doctrine, which has been abrogated probably universally, by statutes and constitutional provisions which make the truth a defense where publication was with

Tenn. 289, 52 S. W. 151, 45 L. R. A. 600; *Pollard v. Lyon*, 91 U. S. 225, 23 L. Ed. 308.

¹⁴⁰ *Castle v. Houston*, 19 Kan. 417, 27 Am. Rep. 127; *Courier Journal Co. v. Phillips*, 142 Ky. 372, 134 S. W. 446, 32 L. R. A. (N. S.) 309; *Sullings v. Shakespeare*, 46 Mich. 408, 9 N. W. 451, 41 Am. Rep. 166; *Joannes v. Jennings*, 6 Thomp. & C. (N. Y.) 138; *Baum v. Clause*, 5 Hill (N. Y.) 196; *Press Co. v. Stewart*, 119 Pa. 584, 14 Atl. 51. But in some states by statute the truth is made a defense to an action for libel only when the publication was with good motives. So in Illinois (Const. 1870, art. 2, § 4), Florida (Declaration of Rights, § 13; *Wilson v. Marks*, 18 Fla. 322), Maine (Rev. St. 1903, c. 84, § 42; *Pierce v. Rodliff*, 95 Me. 346, 50 Atl. 32), Massachusetts (Rev. Laws 1902, c. 173, § 91; plaintiff must prove malice, *Conner v. Standard Pub. Co.*, 183 Mass. 474, 67 N. E. 596), and West Virginia (Const. art. 3, § 7; *Sweeney v. Baker*, 13 W. Va. 158, 31 Am. Rep. 757).

¹⁴¹ *Castle v. Houston*, 19 Kan. 417, 420, 27 Am. Rep. 127, where *Horton, C. J.*, added: "This doctrine was based upon the theory that, where it was honestly believed a particular person had committed a crime, it was the duty of him who so believed, or so knew, to cause the offender to be prosecuted and brought to justice, as in a settled state of government a party aggrieved ought to complain for an injury to the settled course of law; and to neglect this duty and pub-

good motives and for justifiable ends,¹⁴⁸ or even, as some courts have held, irrespective of motive.¹⁴⁹

But, though the truth be a defense to a civil action, it is essential that defendant plead the specific facts which he claims constitute his justification. A general averment that the charge is true, or a denial that it is false, will raise no issue.¹⁵⁰ This requirement is "intended to prevent surprise by informing the plaintiff of what he must expect to meet,"¹⁵¹ and that the court "may judge whether the facts warrant the charge."¹⁵² Furthermore, "the justification as pleaded and proved must be as broad as the charge," for "there is no such thing as a halfway justification."¹⁵³ Hence, where it was stated that plaintiff had stolen \$1 from A., evidence that he had stolen \$1 from B. is not ad-

lish the offense to the world, thereby bringing the party published into disgrace or ridicule, without an opportunity to show by the judgment of a court that he was innocent, was libelous, and if the matter charged was in fact true (thereby insuring social ostracism), the injury caused by the publication was much greater than where the publication was false. A false publication, it was contended, could be explained and exposed; a true one was difficult to explain away. As an additional reason for this rule, it was also held that such publications, even if true, were provocative of breaches of the peace, and the greater the truth contained therein the greater the liability of hostile meetings therefrom." To the same effect, *People v. Croswell*, 3 Johns. Cas. (N. Y.) 337.

¹⁴⁸ *E. g.*, Florida (Declaration of Rights, § 13), Illinois (Rev. St. 1909, c. 38, § 179; Const. 1870, art. 2, § 4; *People v. Fuller*, 238 Ill. 116, 87 N. E. 336), Nebraska (Const. art. 1, § 5), New Jersey (Const. art. 1, par. 5), New York (Const. art. 1, § 8; Penal Law [Consol. Laws, c. 40] § 1342), and West Virginia (Const. art. 3, par. 7).

¹⁴⁹ *State v. Bush*, 122 Ind. 42, 23 N. E. 677; *Razee v. State*, 73 Neb. 732, 103 N. W. 438.

¹⁵⁰ *Hunt v. Fidelity Mutual Life Ins. Co.*, 167 Ala. 188, 51 South. 1000; *Donahoe v. Star Pub. Co.*, 3 Pennewill (Del.) 545, 53 Atl. 1028; *Fodor v. Fuchs*, 77 N. J. Law, 92, 71 Atl. 108; *Brush v. Blot*, 16 App. Div. 80, 44 N. Y. Supp. 1073; *Van Derveer v. Sutphin*, 5 Ohio St. 294; *Sweeney v. Baker*, 13 W. Va. 158, 31 Am. Rep. 757.

¹⁵¹ *Wachter v. Quenzer*, 29 N. Y. 547, 553. See *Ames v. Hazard*, 8 R. I. 143, 147.

¹⁵² *Torrey v. Field*, 10 Vt. 353, 408. See *De Armond v. Armstrong*, 37 Ind. 35, 56.

¹⁵³ *Fero v. Ruscoe*, 4 N. Y. 162, 165, per Bronson, C. J. See *Miller v. McDonald*, 139 Ind. 465, 467, 39 N. E. 159.

missible,¹⁵⁴ nor, where the charge was of incest with one daughter, can defendant show that plaintiff had committed or attempted an outrage upon another daughter,¹⁵⁵ nor is it an answer to a libel charging a party with having been "actively and profitably engaged" in smuggling "during the late war" that he had violated the revenue laws in a single instance previous to the war and in time of peace.¹⁵⁶ Further illustrations are given in the note.¹⁵⁷

So, since he who says that there is a rumor or report makes the same charge in legal intendment that he would have done had he made a direct assertion, it is clear that he cannot be permitted to set up in defense that there was in fact such a rumor or report,¹⁵⁸ though a charge of bad reputation can be justified by showing that such reputation existed.¹⁵⁹ There is, moreover, an exception to the rule that the answer must be specific in its denial, and that is where the charge is specific. Thus, a charge that one is a thief can only be met by a definite averment of certain instances of larceny;¹⁶⁰ but it is otherwise of "a charge that

¹⁵⁴ *Gardner v. Self*, 15 Mo. 480.

¹⁵⁵ *Haddock v. Naughton*, 74 Hun, 391, 26 N. Y. Supp. 455.

¹⁵⁶ *Stilwell v. Barter*, 19 Wend. (N. Y.) 487.

¹⁵⁷ *Wallace v. Homestead Co.*, 117 Iowa, 348, 90 N. W. 835; *Eastland v. Caldwell*, 2 Bibb (Ky.) 21, 4 Am. Dec. 668; *Rutherford v. Paddock*, 180 Mass. 289, 62 N. E. 381, 91 Am. St. Rep. 282; *Feely v. Jones*, 79 Hun, 18, 29 N. Y. Supp. 446, affirmed 151 N. Y. 656, 46 N. E. 1146; *Stiles v. Comstock*, 9 How. Prac. (N. Y.) 48; *Burford v. Wible*, 32 Pa. 95; *Torrey v. Field*, 10 Vt. 353, 408.

¹⁵⁸ "Let it be understood that a bare rumor or report is sufficient to justify the retelling of slander, and character would be at the mercy of the artful and designing, as such defenses could be easily manufactured beforehand to suit any emergency." *Kelley v. Dillon*, 5 Ind. 426, 427, per Hovey, J. To the same effect, *Powers v. Skinner*, 1 Wend. (N. Y.) 451; *Watkin v. Hall*, L. R. 3 Q. B. 396.

¹⁵⁹ *Cooper v. Greeley*, 1 Denio (N. Y.) 347. Here defendant, after stating that plaintiff had brought suit for libel, added that he would not like to bring it to trial in a particular county, "for he is known there." Held a proper justification that plaintiff had the reputation in said county of a proud, captious, censorious, arbitrary, dogmatical, malicious, illiberal, revengeful, and litigious man, and that therefore he was in bad repute.

¹⁶⁰ *Kansas City Star Co. v. Carlisle*, 106 Fed. 344, 47 C. C. A. 384.

defendant on a day and at a place named took specified articles of personal property under such specified circumstances as to justify the conclusion that the taking was willful and a larceny. In such a case an answer can be interposed alleging generally the truth of the specific statements of fact alleged in the complaint."¹⁶¹ Furthermore, the general principle is not to be construed to mean that the justification must embrace every charge, for, if separate and distinct charges are made, defendant may justify as to some and plead otherwise as to others.¹⁶²

Defamatory matter is presumptively false. All that the plaintiff has to do in the first instance is to prove the publication of and concerning him. This is first to be considered by the jury. If he fail to do so, there is an end of the case. If he succeed, he is entitled to a verdict, unless the defendant should establish the truth of the fact charged by a preponderance of evidence. If this is left in doubt, the justification is not made out.¹⁶³ It is also well to keep in mind that it is bad tactics to plead justification, unless there is a reasonable expectation of establishing it, for, if defendant fail to do so, it is generally held that the jury may be instructed that, if they find that the plea was not interposed in good faith, they are at liberty, in assessing the damages, to consider this reiteration of the defamation as evidence of malice.¹⁶⁴

Cf. Wachter v. Quenzer, 29 N. Y. 547, 552; *Sunman v. Brewin*, 52 Ind. 140.

¹⁶¹ *Bingham v. Gaynor*, 203 N. Y. 27, 35, 96 N. E. 84.

¹⁶² *Merrey v. Guardian Printing & Publishing Co.*, 79 N. J. Law, 177, 74 Atl. 464; *Lanpher v. Clark*, 149 N. Y. 472, 44 N. E. 182.

¹⁶³ *Sperry v. Wilcox*, 1 Metc. (Mass.) 267; *Finley v. Widner*, 112 Mich. 230, 70 N. W. 433; *Sotham v. Drivers' Telegram Co.*, 239 Mo. 606, 144 S. W. 428; *Sacchetti v. Fehr*, 217 Pa. 475, 66 Atl. 742; *Reynolds v. Holland*, 46 Wash. 537, 90 Pac. 648.

¹⁶⁴ *Dauphiny v. Buhne*, 153 Cal. 757, 96 Pac. 880, 126 Am. St. Rep. 136; *Ward v. Dick*, 47 Conn. 300, 36 Am. Rep. 75; *Ruskin v. Arma*, 82 N. J. Law, 72, 81 Atl. 342; *Marx v. Press Pub. Co.*, 134 N. Y. 561, 31 N. E. 918; *Distin v. Rose*, 69 N. Y. 122; *Pfister v. Milwaukee Free Press Co.*, 139 Wis. 627, 121 N. W. 938. *Contra*, *Rev. Laws Mass.* 1902, c. 173, § 90. *Cf. Jackson v. Stetson*, 15 Mass. 48; *Whitaker v. McQueen*, 128 Ky. 260, 108 S. W. 236.

2. Fair Comment

"Every one has a right to comment on matters of public interest and concern, provided he does so fairly and with an honest purpose."¹⁶⁶ It is, of course, impossible to set forth in detail the subjects of permissible criticism. The community has, for instance, an interest in the conduct of public officers and the qualifications of candidates for office,¹⁶⁶ in the acts of public men with reference to public affairs,¹⁶⁷ and in the character and quality of books,¹⁶⁸ pictures,¹⁶⁹ entertainments,¹⁷⁰ and other offerings for public patronage.¹⁷¹ It matters not that the opinion expressed was hostile or incorrect, that the writer was prejudiced, or that damage has been suffered. "Mere exaggeration, or even gross exaggeration," it has been said, "would not make the comment unfair;"¹⁷² nor would sarcasm or ridicule, since

¹⁶⁶ *Bearce v. Bass*, 88 Me. 521, 539, 84 Atl. 411, 51 Am. St. Rep. 446; *Johns v. Press Pub. Co.*, 19 N. Y. Supp. 3.

¹⁶⁷ *Miner v. Detroit Post & Tribune Co.*, 49 Mich. 358, 18 N. W. 773; *Herringer v. Ingberg*, 91 Minn. 71, 97 N. W. 460; *Diener v. Star-Chronical Pub. Co.*, 230 Mo. 613, 132 S. W. 1143, 33 L. R. A. (N. S.) 216; *Express Printing Co. v. Copeland*, 64 Tex. 354.

¹⁶⁸ *Klos v. Zahorik*, 113 Iowa, 161, 84 N. W. 1046, 53 L. R. A. 235; *Duffy v. New York Evening Post Co.*, 109 App. Div. 471, 96 N. Y. Supp. 629; *Kelly v. Tinling*, L. R. 1 Q. B. 699; *Seymour v. Butterworth*, 8 F. & F. 372. Cf. *Ruhland v. Cole*, 143 Wis. 367, 127 N. W. 959.

¹⁶⁹ *Dowling v. Livingstone*, 108 Mich. 321, 66 N. W. 225, 32 L. R. A. 104, 62 Am. St. Rep. 702; *Reade v. Sweetzer*, 6 Abb. Prac. N. S. (N. Y.) 9, note.

¹⁷⁰ *Outcault v. New York Herald Co.*, 117 App. Div. 534, 102 N. Y. Supp. 665; *Thompson v. Shackell*, 1 Mood. & Mal. 187.

¹⁷¹ *Cherry v. Des Moines Leader*, 114 Iowa, 298, 86 N. W. 323, 54 L. R. A. 855, 89 Am. St. Rep. 365.

¹⁷² *Gott v. Pulsifer*, 122 Mass. 235, 23 Am. Rep. 322 ("Cardiff Giant"); *Press Co., Ltd. v. Stewart*, 119 Pa. 584, 14 Atl. 51 (school); *Soane v. Knight*, 1 Mood. & Mal. 74 (architectural work). Cf. *Hunter v. Sharpe*, 4 F. & F. 983 (treatment of consumption); *Paris v. Levy*, 9 C. B. N. S. 342 (advertising handbill).

¹⁷³ Referring to comment upon a play. *Merivale v. Carson*, L. R. 20 Q. B. D. 275, 281, per Esher, M. R., who added: "The question which the jury must consider is this: Would any fair man, however prejudiced he may be, however exaggerated or obstinate his views, have said that which this criticism has said of the work criticized." To the same effect, *Cherry v. Des Moines Leader*, 114

they are often the fittest weapons to employ against error.¹⁷³ Still the language may be so severe and such epithets may be employed as to furnish a basis for a reasonable inference by the jury that malice existed.¹⁷⁴ "Criticism cannot be used as a cloak for mere invective."¹⁷⁵

Other limitations must be noted. Criticism must be impersonal; that is, it must not be upon the individual himself, but upon his official conduct or qualifications, or upon his work. The privilege which the law extends to fair comment upon public matters cannot be made the excuse for an attack upon the private character of the officer, candidate, author, painter, or other individual whose production is under discussion.¹⁷⁶ Again, one has no right to make false statements of fact merely because the subject-matter is of public interest, but only to criticize, discuss, and comment upon the real facts. Hence the basis must be a fact, and not a falsehood.¹⁷⁷ The law will not extend

Iowa, 298, 86 N. W. 323, 54 L. R. A. 855, 89 Am. St. Rep. 365; Vance v. Louisville Courier-Journal Co., 95 Ky. 41, 23 S. W. 591; Howarth v. Barlow, 113 App. Div. 510, 99 N. Y. Supp. 457; Strauss v. Francis, 4 F. & F. 1107.

¹⁷³ Cherry v. Des Moines Leader, 114 Iowa, 298, 86 N. W. 323, 54 L. R. A. 855, 89 Am. St. Rep. 365 (theatrical entertainment); Dowling v. Livingstone, 108 Mich. 321, 66 N. W. 225, 32 L. R. A. 104, 62 Am. St. Rep. 702 (book); CARR v. HOOD, 1 Campb. 355, note, Chapin Cas. Torts, 167 (book); Soane v. Knight, 1 Mood. & Mal. 74 (architectural work); Odger v. Mortimer, 28 L. T. N. S. 472 (public man).

¹⁷⁴ Mulderig v. Wilkes-Barre Times, 215 Pa. 470, 64 Atl. 636, 114 Am. St. Rep. 967; BUCKSTAFF v. VIAL, 84 Wis. 129, 54 N. W. 111, Chapin Cas. Torts, 164; Seymour v. Butterworth, 3 F. & F. 372.

¹⁷⁵ McGuire v. Western Morning News Co. (1903) 2 K. B. 100, 109, per Collins, M. R.

¹⁷⁶ Rearick v. Wilcox, 81 Ill. 77; Clifton v. Lange, 108 Iowa, 472, 79 N. W. 276; Morris v. Saller (1911) 154 Mo. App. 305, 134 S. W. 98; Triggs v. Sun Printing & Publishing Ass'n, 179 N. Y. 144, 71 N. E. 739, 86 L. R. A. 612, 103 Am. St. Rep. 841, 1 Ann. Cas. 326; Cooper v. Stone, 24 Wend. (N. Y.) 434; Wood v. Boyle, 177 Pa. 620, 35 Atl. 853, 55 Am. St. Rep. 747; Stuart v. Lovell, 2 Stark, 92, 3 E. C. L. 331. Cf. Ott v. Murphy (1913) 160 Iowa, 730, 141 N. W. 463. Still with respect to officers and particularly candidates there must be allowed some latitude in commenting upon moral character as affecting their fitness. Cf. Comm. v. Wardwell, 136 Mass. 164, 169, though here the defense was privilege.

¹⁷⁷ Hubbard v. Allyn, 200 Mass. 163, 170, 86 N. E. 356.

protection to one who invents a fiction for the purpose of drawing conclusions. Thus "it is one thing to comment upon or criticize, even with severity, the acknowledged or proved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct."¹⁷⁸ And, when reviewing a book or play, the critic must not impute to the author that he has written something which in fact he has not.¹⁷⁹ So "a line must be drawn between criticism upon public conduct and the imputation of motives by which that conduct may be supposed to be actuated. One man has no right to impute to another, whose conduct may be fairly open to ridicule or disapprobation, base, sordid, and wicked motives, unless there is so much ground for the imputation that a jury shall find, not only that he had an honest belief in the truth of the statements, but that his belief was not without foundation."¹⁸⁰ Furthermore, there must have been an honest design to enlighten the community respecting the merits or demerits of the matter, and not to subserve some ulterior purpose.¹⁸¹ But this will be discussed later, when malice is considered.¹⁸²

¹⁷⁸ *Davis v. Shepstone*, 11 App. Cas. 187, 190, per Lord Herschell. To the same effect, *Donahoe v. Star Pub. Co.*, 4 Pennewill (Del.) 166, 55 Atl. 337 (affirmed in [Del. Sup.] 58 Atl. 513, where the question is discussed as though one of privilege); *Burt v. Advertiser Newspaper Co.*, 154 Mass. 238, 28 N. E. 1, 13 L. R. A. 97; *Oakes v. State*, 98 Miss. 80, 54 South. 79, 33 L. R. A. (N. S.) 207; *Farley v. McBride*, 74 Neb. 49, 103 N. W. 1036.

¹⁷⁹ He cannot, for instance, escape liability if he wrongly assert that the story turns upon adultery. *Merivale v. Carson*, L. R. 20 Q. B. D. 275.

¹⁸⁰ *Campbell v. Spottiswoode*, 3 B. & S. 769, 776, 122 Eng. Repr. 288, per Cockburn, C. J. To the same effect, *Negley v. Farrow*, 60 Md. 158, 45 Am. Rep. 715; *Curtis v. Mussey*, 6 Gray (72 Mass.) 261; *MacDonald v. Sun Print. & Pub. Ass'n*, 111 App. Div. 467, 98 N. Y. Supp. 118; *Neeb v. Hope*, 111 Pa. 145, 2 Atl. 568. Cf. *Hamilton v. Eno*, 81 N. Y. 116.

¹⁸¹ See *Schomberg v. Walker*, 132 Cal. 224, 64 Pac. 290; *Thomas v. Bradbury Agnew & Co.*, [1906] 2 K. B. D. 627.

¹⁸² See *infra*, p. 338 et seq.

3. *Privilege*

Under certain circumstances, the law will exempt from liability one who makes a defamatory statement in the performance of a duty or for the purpose of subserving an interest. There is this difference between privilege and comment or criticism: "A privileged occasion is one on which the privileged person is entitled to do something which no one else who is not within the privilege is entitled to do on that occasion. A person in such a position may say or write about another person things which no other person * * * can be allowed to say or write. But in the case of a criticism * * * every person * * * is entitled to do and is forbidden to do exactly the same things."¹⁸³ It must likewise be noted that, if the occasion is privileged, a *bona fide* statement of fact not in excess of the occasion will be protected, though it turns out to be false; but where the defense of comment is invoked, since what is protected is criticism, not statement, one must not have asserted facts which are defamatory and untrue. In the first case, it is the communication of facts which is protected; in the second, it is the comment on admitted or established facts.¹⁸⁴

Privilege may be absolute or qualified. Under the first head are statements made by members of Parliament, of Congress, and of the state Legislatures in the course of debate,¹⁸⁵ and by judges¹⁸⁶ and jurors,¹⁸⁷ as also by parties.

¹⁸³ *Merivale v. Carson*, L. R. 20 Q. B. D. 275, 280, per Lord Esher, M. R.

¹⁸⁴ *Burt v. Advertiser Newspaper Co.*, 154 Mass. 238, 242, 28 N. E. 1, 13 L. R. A. 97.

¹⁸⁵ See Const. Mass. pt. 1, art. 21; Const. N. J. art. 4, § 4, par. 8; Const. N. Y. art. 3, § 12; Const. U. S. art. 1, § 6; Bill of Rights, 1 Wm. & Mary, Sess. 2, c. 2.

¹⁸⁶ "This doctrine has been applied, not only to the superior courts, but to the court of a coroner, and to a court-martial, which is not a court of record. It is essential in all courts that the judges who are appointed to administer the law should be permitted to administer it under the protection of the law, independently and freely, without favor, and without fear. This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the

¹⁸⁷ *Dunham v. Powers*, 42 Vt. 1.

witnesses, and counsel. There is here no cause of action, even though the words be uttered maliciously. But with respect to the last three it has been held in England that immunity will be extended without regard to the relevancy of the statement to the subject of inquiry,¹⁸⁸ though not, it has been intimated, where the defamatory matter is completely beyond its scope.¹⁸⁹ In America, however, it is generally held that it should be pertinent and material.¹⁹⁰ It has been observed that "the qualification of the English rule is adopted, in order that the protection given to individuals in the interest of an efficient administration of justice may not be abused as a cloak from beneath which to gratify private malice."¹⁹¹ But, "in determining what

benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence, and without fear of consequences. How could a judge so exercise his office, if he were in daily and hourly fear of an action being brought against him, and of having the question submitted to a jury whether a matter on which he had commented judicially was or was not relevant to the case before him? Again, if a question arose as to the bona fides of the judge, it would have, if the analogy of similar cases is to be followed, to be submitted to the jury. Thus, if we were to hold that an action is maintainable against a judge for words spoken by him in his judicial capacity, under such circumstances as those appearing on these pleadings, we should expose him to constant danger of having questions such as that of good faith or relevancy raised against him before a jury, and of having the mode in which he might administer justice in his court submitted to their determination. It is impossible to overestimate the inconvenience of such a result." *SCOTT v. STANSFIELD*, L. R. 3 Exch. 220, 223, *Chapin Cas. Torts*, 170, per Kelly, C. B.

¹⁸⁸ *Munster v. Lamb*, 11 Q. B. D. 588 (counsel); *Seaman v. Netherclift*, 2 C. P. D. 53 (witness); *Goffin v. Donnelly*, 6 Q. B. D. 307 (witness before committee of House of Commons); *Dawkins v. Rokeby*, L. R. 7 H. L. 744 (witness before military court).

¹⁸⁹ *Seaman v. Netherclift*, 2 C. P. D. 53, 56.

¹⁹⁰ *Barnes v. McCrate*, 32 Me. 442 (witness); *Hoar v. Wood*, 3 Metc. (Mass.) 193 (complainant); *Marsh v. Ellsworth*, 50 N. Y. 309 (counsel); *Gilbert v. People*, 1 Denio (N. Y.) 41, 43 Am. Dec. 646 (counsel); *Shelfer v. Gooding*, 47 N. C. 175 (counsel); *Cooley v. Galyon*, 109 Tenn. 1, 70 S. W. 607, 60 L. R. A. 139, 97 Am. St. Rep. 823 (witness). Cf. *Badgley v. Hedges*, 2 N. J. Law, 233; *Moore v. Mfrs' Nat. Bank of Troy*, 123 N. Y. 420, 25 N. E. 1048, 11 L. R. A. 753.

¹⁹¹ *McLaughlin v. Cowley*, 127 Mass. 316, 319, per Lord, J.

is pertinent, much latitude must be allowed to the judgment and discretion of those who are intrusted with the conduct of a cause in court,"¹⁹² and hence, "in applying this principle, the courts are liberal, even to the extent of declaring that, where matter is put forth by counsel in the course of a judicial proceeding that may possibly be pertinent, they will not so regard it as to deprive its author of his privilege."¹⁹³

Now, as to qualified or conditional privilege: Here the party defamed may recover, if he prove that the defamer acted maliciously. The principle has been declared to be that "a communication made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty," nor can "duty" be "confined to legal duties which may be enforced by indictment, action, or mandamus, but must include moral and social duties of imperfect obligation."¹⁹⁴ Necessarily this must include so many cases that reference can be made to but a few.

An important illustration is the publication of a fair report of proceedings in Parliament, Congress, or the state Legislature;¹⁹⁵ also of proceedings in a court of justice, and it matters not whether the latter is of superior or inferior jurisdiction,¹⁹⁶ since "for this purpose no distinction can be made between a court of *pie poudre* and the House of Lords sitting as a court of justice,"¹⁹⁷ or whether the hear-

¹⁹² Hoar v. Wood, 3 Metc. (Mass.) 193, 197, per Lord, J.

¹⁹³ Youmans v. Smith, 153 N. Y. 214, 219, 47 N. E. 265, per Vann, J.

¹⁹⁴ Harrison v. Bush, 5 El. & Bl. 344, 348, 349, per Lord Campbell, C. J.

¹⁹⁵ Terry v. Fellows, 21 La. Ann. 375; Garby v. Bennett, 166 N. Y. 392, 59 N. E. 1117; Code Civ. Proc. N. Y. § 1907; Wason v. Walker, L. R. 4 Q. B. 73, 8 B. & S. 671, 38 L. J. Q. B. 34, 19 L. T. N. S. 406, 17 W. R. 169.

¹⁹⁶ McBee v. Fulton, 47 Md. 403, 28 Am. Rep. 465; Conner v. Standard Pub. Co., 183 Mass. 474, 67 N. E. 596; Bissell v. Press Pub. Co., 62 Hun, 551, 17 N. Y. Supp. 393. See Code Civ. Proc. N. Y. § 1907; 51 & 52 Vict. c. 64, §§ 3, 4.

¹⁹⁷ Lewis v. Levy, 96 E. C. L. 535, 553, per Lord Campbell, C. J.

ing be *ex parte* or in the presence of both parties.¹⁹⁸ Nor will it matter that the reputation of one not a party to the proceeding is affected.¹⁹⁹ True, one is under no duty to report judicial proceedings; but there is a public interest in the proper administration of justice, and it is for this reason that the law extends protection.²⁰⁰ This being so and not because the public are otherwise concerned in the controversies of individuals, no privilege will attach to the publication of matter contained in pleadings and affidavits, though filed in court, where judicial action has not been taken thereon.²⁰¹

The report must be fair and accurate.²⁰² Defamatory matter should not be interpolated.²⁰³ Comment,²⁰⁴ and headlines which are in effect comment,²⁰⁵ are of course

¹⁹⁸ *Belser v. Scripps-McRae Pub. Co.*, 113 Ky. 383, 68 S. W. 457; *McBee v. Fulton*, 47 Md. 403, 28 Am. Rep. 465; *Ackerman v. Jones*, 37 N. Y. Super. Ct. 42; *Metcalf v. Times Pub. Co.*, 20 R. I. 674, 40 Atl. 864, 78 Am. St. Rep. 900; *Kimber v. Press Ass'n, Ltd.* (1893) L. R. 1 Q. B. D. 65; *Usill v. Hales* (1878) L. R. 3 C. P. D. 319.

¹⁹⁹ *Ackerman v. Jones*, 37 N. Y. Super. Ct. 42.

²⁰⁰ *Cf. Sweet v. Post Pub. Co.*, 215 Mass. 450, 102 N. E. 660, 47 L. R. A. (N. S.) 240, Ann. Cas. 1914D, 533.

²⁰¹ *Cowley v. Pulsifer*, 137 Mass. 392, 50 Am. Rep. 318; *Nixon v. Dispatch Printing Co.*, 101 Minn. 309, 112 N. W. 258, 12 L. R. A. (N. S.) 188, 11 Ann. Cas. 161; *Byers v. Meridian Print. Co.*, 84 Ohio St. 408, 95 N. E. 917, 38 L. R. A. (N. S.) 913; *Meeker v. Post Printing & Publishing Co.*, 55 Colo. 355, 135 Pac. 457, Ann. Cas. 1915A, 126. *Cf. Lundin v. Post Pub. Co.*, 217 Mass. 213, 104 N. E. 480, 52 L. R. A. (N. S.) 207.

²⁰² *Sweet v. Post Pub. Co.*, 215 Mass. 450, 102 N. E. 660, 47 L. R. A. (N. S.) 240, Ann. Cas. 1914D, 533.

²⁰³ *Atlanta News Pub. Co. v. Medlock*, 123 Ga. 714, 51 S. E. 756, 3 L. R. A. (N. S.) 1139; *Bathrick v. Detroit Post & Tribune Co.*, 50 Mich. 629, 16 N. W. 172, 45 Am. Rep. 63; *Stuart v. Press Pub. Co.*, 83 App. Div. 487, 82 N. Y. Supp. 401; *Cooper v. Lawson*, 8 Adol. & EL 746.

²⁰⁴ *Pittcock v. O'Neill*, 63 Pa. 253, 3 Am. Rep. 544; *Brown v. Providence Telegram Pub. Co.*, 25 R. I. 117, 54 Atl. 1061; *Lewis v. Levy*, 27 L. J. Q. B. 282. *Cf. Com. v. Blanding*, 3 Pick. (Mass.) 304, 15 Am. Dec. 214, note.

²⁰⁵ *Brown v. Knapp & Co.*, 213 Mo. 655, 112 S. W. 474; *Brown v. Globe Printing Co.*, 213 Mo. 611, 112 S. W. 462, 127 Am. St. Rep. 627; *Edsall v. Brooks*, 17 Abb. Prac. (N. Y.) 221; *Hayes v. Press Co.*, 127 Pa. 642, 18 Atl. 331, 5 L. R. A. 643, 14 Am. St. Rep. 874; *Isley v. Sentinel Co.*, 133 Wis. 20, 113 N. W. 425, 126 Am. St. Rep. 928; *Dorr*

interpolated matter. Still, as has been seen, comment will be protected if it can be brought within the limits of discussion upon a matter of public interest.²⁰⁶ So will headlines, if they are a fair index to the matter to which they refer.²⁰⁷ It is not essential that the proceeding be reported verbatim. A fair abstract will be sufficient.²⁰⁸ But it must be fair, not garbled;²⁰⁹ nor can the reporter select such portions as reflect upon plaintiff's character, and omit what is favorable.²¹⁰

At common law, no privilege appears to have attached to the publication, when not required to be made by law, of proceedings before purely local bodies, such as city or town councils,²¹¹ poor law guardians,²¹² improvement commissioners,²¹³ or vestry boards.²¹⁴ In America, there has been some tendency to reject this view, and to uphold

v. United States, 195 U. S. 138, 24 Sup. Ct. 808, 49 L. Ed. 128, 1 Ann. Cas. 697.

²⁰⁶ See *supra*, p. 323; *Brown v. Knapp & Co.*, 213 Mo. 655, 687, 112 S. W. 474; *Hibbins v. Lee*, 4 F. & F. 243. It has been said that it should not be made as part of the report, but should be kept separate. *Andrews v. Chapman*, 3 C. & K. 289, 88 Rev. Rep. 830, *per Campbell, C. J.*

²⁰⁷ *Lawyers' Co-Op. Pub. Co. v. West Pub. Co.*, 32 App. Div. 585, 52 N. Y. Supp. 1120.

²⁰⁸ *Boogher v. Knapp*, 97 Mo. 122, 11 S. W. 45; *Salisbury v. Union & Advertiser Co.*, 45 Hun (N. Y.) 120; *American Pub. Co. v. Gamble*, 115 Tenn. 663, 90 S. W. 1005; *Hoare v. Silverlock*, 9 C. B. 20; *Turner v. Sullivan*, 6 L. T. N. S. 130. This may appear in the judge's charge. *Milssich v. Lloyds*, 13 Cox. Cr. Cas. 575.

²⁰⁹ See *Arnold v. Sayings Co.*, 76 Mo. App. 159; *Salisbury v. Union & Advertiser Co.*, 45 Hun (N. Y.) 120, 123; *Thomas v. Croswell*, 7 Johns. (N. Y.) 264, 5 Am. Dec. 269.

²¹⁰ See *Brown v. Knapp & Co.*, 213 Mo. 655, 112 S. W. 474; *Metcalf v. Times Pub. Co.*, 20 R. I. 674, 40 Atl. 864, 78 Am. St. Rep. 900; *Saunders v. Mills*, 6 Bing. 213.

²¹¹ *Buckstaff v. Hicks*, 94 Wis. 34, 68 N. W. 403, 59 Am. St. Rep. 853. Cf. *Ilsley v. Sentinel Co.*, 133 Wis. 20, 113 N. W. 425, 126 Am. St. Rep. 928.

²¹² *Purcell v. Sowler*, 2 C. P. 215. But see *Allbutt v. General Council, etc.*, 23 Q. B. D. 400, where it was said that *Purcell v. Sowler* went upon the ground that the proceedings were *ex parte*.

²¹³ *Davison v. Duncan*, 7 El. & Bl. 229.

²¹⁴ *Popham v. Pickburn*, 7 Hurl. & N. 891.

full and fair reports of the meetings of local bodies,²¹⁸ and of quasi public organizations, such as medical²¹⁹ or religious societies,²¹⁷ educational institutions,²¹⁸ and fraternal orders,²¹⁹ though this is by no means clear. In England,²²⁰ and in some states, records of public meetings are made privileged by statute.²²¹ Logically there seems no reason why privilege should be extended to such proceedings merely because they are public.²²² If the particular matter is to be protected, it should be because the publisher of the report and the readers had a community of interest therein, and not merely because the words were uttered in the hearing of an audience called to listen to them.²²³ Even though speaker and hearer were interested, yet publisher and reader may not have been.²²⁴

In the foregoing cases the defendant was protecting a public interest. The same principle applies where the interest is private. Examples of this class are statements honestly made in an endeavor to recover property stol-

²¹⁸ *Meteye v. Times-Democrat Pub. Co.*, 47 La. Ann. 824, 17 South. 314 (committee of common council).

²¹⁹ *Barrows v. Bell*, 7 Gray (Mass.) 301, 66 Am. Dec. 479, note.

²¹⁷ See *Redgate v. Roush*, 61 Kan. 490, 59 Pac. 1050, 48 L. R. A. 236; *Farnsworth v. Storrs*, 5 Cush. (Mass.) 412; *Lothrop v. Adams*, 133 Mass. 471, 43 Am. Rep. 528; *Shurtleff v. Stevens*, 51 Vt. 501, 31 Am. Rep. 698.

²¹⁹ See *Gattis v. Kilgo*, 140 N. C. 106, 52 S. E. 249.

²¹⁹ *Kirkpatrick v. Eagle Lodge No. 32*, 26 Kan. 384, 40 Am. Rep. 316.

²²⁰ 51 & 52 Vict. c. 64, § 4, providing that a report of the proceedings of a public meeting, or of the meeting of any board or local authority, or committee thereof, formed or constituted under act of Parliament, is privileged. See *Allbutt v. General Council*, etc., 23 Q. B. D. 400.

²²¹ Civ. Code Cal. § 47, subd. 5; Code Civ. Proc. N. Y. § 1907; Rev. Civ. St. Tex. 1911, art. 5597, subd. 3.

²²² Cf. *Kelly v. O'Malley*, 6 T. L. R. 62.

²²³ Cf. *Ponsford v. Financial Times*, 16 T. L. R. 248.

²²⁴ *Kimball v. Post Pub. Co.*, 199 Mass. 248, 85 N. E. 103, 19 L. R. A. (N. S.) 862, holding that a report of the proceedings at a business meeting of the stockholders of a private corporation is not privileged.

en,²²⁵ or believed to have been stolen,²²⁶ or to prosecute the supposed offender,²²⁷ though they amount to imputations that plaintiff has been guilty of the larceny; also statements by a master giving reasons for the discharge of a servant, made to the latter while discharging him,²²⁸ or made while giving notice of his dismissal to fellow servants for the purpose of preventing them from associating with him,²²⁹ or to customers, the trade,²³⁰ or fellow members of an association,²³¹ for the purpose of conveying information that his authority had terminated. So are charges that defendant's proprietary rights have been violated, coupled with warnings against unauthorized dealing with the articles in question.²³² But in this as in the preceding cases the language used must be appropriate, and not beyond what is necessary to accomplish the end designed; that is, the giving of the notice itself,²³³ a point which will be discussed later, when excess of privilege is considered. One whose reputation has been attacked may reply, and make apt retort.²³⁴ But this does not authorize him "to

²²⁵ *Grimes v. Coyle*, 6 B. Mon. (45 Ky.) 301; *BROW v. HATHAWAY*, 13 Allen (95 Mass.) 239, Chapin Cas. Torts, 175. Cf. *Mueller v. Radebaugh*, 79 Kan. 306, 99 Pac. 612.

²²⁶ *Padmore v. Lawrence*, 11 Adol. & El. 380.

²²⁷ *Klinck v. Colby*, 46 N. Y. 427, 7 Am. Rep. 360. Cf. *Ginsberg v. Union Surety & Guaranty Co.*, 68 App. Div. 141, 74 N. Y. Supp. 561.

²²⁸ *McCarty v. Lambley*, 20 App. Div. 264, 46 N. Y. Supp. 792.

²²⁹ *Somerville v. Hawkins*, 10 C. B. 583, 20 L. J. C. P. 131, 16 L. T. O. S. 283, 15 Jur. 450.

²³⁰ *Hatch v. Lane*, 105 Mass. 394. Cf. *Ratzel v. New York News Pub. Co.*, 67 App. Div. 598, 73 N. Y. Supp. 843.

²³¹ *Holmes v. Royal Fraternal Union*, 222 Mo. 556, 121 S. W. 100, 26 L. R. A. (N. S.) 1080.

²³² *Blackham v. Pugh*, 2 C. B. Rep. 611. See *John W. Lovell Co. v. Houghton*, 116 N. Y. 521, 22 N. E. 1066, 6 L. R. A. 363; *Hovey v. Rubber Tip Pencil Co.*, 57 N. Y. 119, 15 Am. Rep. 470. These cases seem, however, to present rather a question of slander of title.

²³³ *Holmes v. Clisby*, 121 Ga. 241, 48 S. E. 934, 104 Am. St. Rep. 103.

²³⁴ *Patton v. Cruce*, 72 Ark. 421, 81 S. W. 380, 65 L. R. A. 937, 105 Am. St. Rep. 46; *Shepherd v. Baer*, 96 Md. 152, 53 Atl. 790; *Myers v. Kaichen*, 75 Mich. 272, 42 N. W. 820; *Koenig v. Ritchie*, 3 F. & F. 413. Cf. *O'Connor v. Sill*, 60 Mich. 175, 27 N. W. 13, 28 N. W. 162.

publish any and all kinds of charges against the offender, upon the theory that they tend to degrade him and thereby discredit his libelous statements. If this were so, every libel might be answered in this way, and the most disgraceful charges made; the person making them being able to shelter himself behind his belief in their truth. The thing published must be something in the nature of an answer, like an explanation or denial. What is said must have some connection with the charge that is sought to be repelled." ²²⁵

Then there may be cases where both parties have an interest in the subject-matter. This interest may be pecuniary, as where the communication is between associates in business respecting an employé,²²⁶ or between taxpayers concerning the management of public funds,²²⁷ or it may be non-pecuniary, as where the communication is between members of a fraternal order,²²⁸ or professional,²²⁹

²²⁵ *Brewer v. Chase*, 121 Mich. 526, 533, 80 N. W. 575, 46 L. R. A. 397, 80 Am. St. Rep. 527, per Hooker, J. To the same effect, *Fish v. St. Louis County Printing & Publishing Co.*, 102 Mo. App. 6, 74 S. W. 641; *Huntley v. Ward*, 6 C. B. N. S. 514, 6 Jur. N. S. 18.

²²⁶ *Trimble v. Morrish*, 152 Mich. 624, 116 N. W. 451, 16 L. R. A. (N. S.) 1017.

²²⁷ *Smith v. Higgins*, 16 Gray (Mass.) 251; *Marks v. Baker*, 28 Minn. 162, 9 N. W. 678; *Howarth v. Barlow*, 113 App. Div. 510, 99 N. Y. Supp. 457; *Spencer v. Amerton*, 1 Moo. & Rob. 470; *George v. Goddard*, 2 F. & F. 689. For further illustrations showing community of pecuniary interest, see *Edwards v. Kevil*, 133 Ky. 392, 118 S. W. 273, 28 L. R. A. (N. S.) 551, 134 Am. St. Rep. 463; *Ashcroft v. Hammond*, 197 N. Y. 488, 90 N. E. 1117; *Campbell v. Bostick* (1893 Tex. Civ. App.) 22 S. W. 828; *Spielberg v. Kuhn*, 39 Utah, 276, 116 Pac. 1027; *Chambers v. Leiser*, 43 Wash. 285, 86 Pac. 627, 10 Ann. Cas. 270.

²²⁸ *Cadle v. McIntosh* (1912) 51 Ind. App. 365, 99 N. E. 779; *Kirkpatrick v. Eagle Lodge No. 32*, 28 Kan. 384, 40 Am. Rep. 316; *Bayliss v. Grand Lodge of State of Louisiana*, 131 La. 579, 59 South. 996; *Graham v. State*, 6 Ga. App. 436, 65 S. E. 167; *Streety v. Wood*, 15 Barb. (N. Y.) 105.

²²⁹ *McKnight v. Hasbrouck*, 17 R. I. 70, 20 Atl. 95; *Shurtleff v. Stevens*, 51 Vt. 501, 31 Am. Rep. 698. Cf. *Barbaud v. Hookham*, 5 Esp. 109.

religious²⁴⁰ or social organizations,²⁴¹ respecting the conduct of a fellow member, as bearing on his qualifications for continued membership and for the purpose of procuring or assisting an investigation.²⁴²

So the words may have been published, pursuant to a legal or moral duty, to one having an interest. Thus privilege attaches to a report rendered by a director to a stockholder,²⁴³ or to a co-director,²⁴⁴ respecting the affairs of the company; to a communication made by a servant to a master, by an agent to a principal, or *vice versa*,²⁴⁵ concerning a matter within the scope of the employment;²⁴⁶ to information about the character or acts of a servant, given to a present or to a prospective employer,²⁴⁷ or relative to the solvency and financial standing of one believed to be a debtor of the inquiring party,²⁴⁸ or one with whom the latter proposes to deal.²⁴⁹ Family relationship may

²⁴⁰ *Jarvis v. Hatheway*, 3 Johns. (N. Y.) 180, 3 Am. Dec. 473. Cf. *Farnsworth v. Storrs*, 5 Cush. (Mass.) 412.

²⁴¹ Cf. *Kersting v. White*, 107 Mo. App. 285, 80 S. W. 730.

²⁴² As to community of nonpecuniary interest, cf. *Howard v. Dickle*, 120 Mich. 238, 79 N. W. 191; *Pendleton v. Hawkins*, 11 App. Div. 602, 42 N. Y. Supp. 626; *Maitland v. Bramwell*, 2 F. & F. 623.

²⁴³ *Lawless v. Anglo-Egyptian Cotton Co.*, L. R. 4 Q. B. 262. Cf. *Rothholz v. Dunkle*, 53 N. J. Law, 438, 22 Atl. 193, 13 L. R. A. 655, 26 Am. St. Rep. 432; *Philadelphia, W. & B. R. Co. v. Quigley*, 21 How. (62 U. S.) 202, 16 L. Ed. 73.

²⁴⁴ *Harris v. Thompson*, 13 C. B. 333.

²⁴⁵ *Easley v. Moss*, 9 Ala. 266; *Bohlinger v. Germania Life Ins. Co.*, 100 Ark. 477, 140 S. W. 257, 36 L. R. A. (N. S.) 449, Ann. Cas. 1913C, 613; *Nichols v. Eaton*, 110 Iowa, 509, 81 N. W. 792, 80 Am. St. Rep. 319; *Atwill v. Mackintosh*, 120 Mass. 177; *Washburn v. Cooke*, 3 Denio (N. Y.) 110.

²⁴⁶ *Jones v. Forehand*, 89 Ga. 520, 16 S. E. 262, 32 Am. St. Rep. 81.

²⁴⁷ *Fresh v. Cutter*, 73 Md. 87, 20 Atl. 774, 10 L. R. A. 67, 25 Am. St. Rep. 575; *Dale v. Harris*, 109 Mass. 193; *Fowles v. Bowen*, 30 N. Y. 20 (here defendant had previously given the servant a letter of recommendation); *Child v. Affleck*, 9 B. & C. 403. There seems but little reason why communications to a prospective employer should be protected, if not upon request. *Sed contra*, *Fresh v. Cutter*, *supra*. Cf. *Dale v. Harris*, *supra*; *Rogers v. Clifton*, 3 Bos. & Pul. 587 (semble); *Pattison v. Jones*, 8 B. & C. 578 (semble).

²⁴⁸ *Ritchie v. Arnold*, 79 Ill. App. 406; *Ormsby v. Douglass*, 37 N. Y. 477.

²⁴⁹ *Melcher v. Beeler*, 48 Colo. 233, 110 Pac. 181, 139 Am. St. Rep.

create a privilege, as where a letter is written by a brother to his sister reflecting upon the character of her suitor,²⁶⁰ or by a son-in-law to his mother-in-law.²⁶¹ But the ties of friendship are not enough.²⁶² All citizens have both an interest and a duty to report the official misconduct or lack of capacity of a public officer to those who have the power to remove or punish the offender.²⁶³

Admitting, as an abstract proposition, that the duty need not be legal, but may be moral, it is none the less difficult to determine to what extent volunteered communications will be protected. Suppose, for instance, a stranger writes to the owner of a ship that the captain has been in a state of constant drunkenness,²⁶⁴ or informs a proposed vendor that a prospective vendee is insolvent, no information having been requested in either instance.²⁶⁵ In both

273; *Richardson v. Gunby*, 88 Kan. 47, 127 Pac. 583, 42 L. R. A. (N. S.) 520; *Fabr v. Hayes*, 50 N. J. Law, 275, 13 Atl. 281; *Robshaw v. Smith*, 38 L. T. 423. Thus commercial agency reports given on request are privileged. *Ormsby v. Douglass*, supra. But not where there is no apparent interest in the recipient; e. g., where sent generally to all subscribers. *King v. Patterson*, 49 N. J. Law, 417, 9 Atl. 705, 60 Am. Rep. 622; *Sunderlin v. Bradstreet*, 46 N. Y. 188, 7 Am. Rep. 322. See *Pollasky v. Minchener*, 81 Mich. 280, 46 N. W. 5, 9 L. R. A. 102, 21 Am. St. Rep. 516.

²⁶⁰ *Adams v. Coleridge*, 1 T. L. R. 84.

²⁶¹ *Todd v. Hawkins*, 2 M. & R. 20. To the same effect, *Faris v. Starke*, 9 Dana (Ky.) 128, 33 Am. Dec. 528; *McBride v. Ledoux*, 111 La. 398, 35 South. 615, 100 Am. St. Rep. 491; *Kimble v. Kimble*, 14 Wash. 369, 44 Pac. 866.

²⁶² *Count Joannes v. Bennett*, 5 Allen (Mass.) 169, 81 Am. Dec. 738. "The duty of refraining from the utterance of slanderous words, without knowing or ascertaining their truth, far outweighs any claim of mere friendship." *Krebs v. Oliver*, 12 Gray (Mass.) 239, 243, per Bigelow, J. See *Byam v. Collins*, 111 N. Y. 143, 19 N. E. 75, 2 L. R. A. 129, 7 Am. St. Rep. 726.

²⁶³ *Ambrosius v. O'Farrell*, 119 Ill. App. 265; *Wleman v. Mabee*, 45 Mich. 484, 8 N. W. 71, 40 Am. Rep. 477; *Frank v. Dessena*, 5 N. J. Law J. 185; *Thorn v. Blanchard*, 5 Johns. (N. Y.) 508; *Ramsey v. Cheek*, 109 N. C. 270, 13 S. E. 775; *Kent v. Bongartz*, 15 R. I. 72, 22 Atl. 1023, 2 Am. St. Rep. 870; *White v. Nicholls*, 3 How. 266, 11 L. Ed. 591; *Harrison v. Bush*, 5 El. & Bl. 344.

²⁶⁴ *Coxhead v. Richards*, 2 C. B. 569.

²⁶⁵ *Bennett v. Deacon*, 2 C. B. 628.

cases the English Court of Common Pleas was equally divided, but subsequently the rule was laid down that, "when a person is so situated that it becomes right in the interests of society that he should tell a third person certain facts, then if he *bona fide* and without malice does tell them, it is a privileged communication."²⁵⁶ This seems too broad a statement, for there is surely as great a moral duty not to communicate defamatory matter that one does not know to be true as to communicate what one believes to be true.²⁵⁷ Such a doctrine encourages the retailing of gossip, and it is submitted will in practice prove exceedingly dangerous. It seems doubtful whether it will be sustained in this country.²⁵⁸

Excess of Privilege

Defendant's methods must have been reasonably adapted to the end designed, whether it be fulfillment of his duty or protection of interest. Privilege cannot be made to cover cases where harm has needlessly been caused. Thus the language employed must not be unnecessarily broad. Irrelevant matter is not protected.²⁵⁹ Thus the persons to

²⁵⁶ *Davies v. Snead*, L. R. 5 Q. B. 608, 611. To the same effect, *Stuart v. Bell* (1891) 2 Q. B. 341.

²⁵⁷ See opinion of Cresswell, J., in *Coxhead v. Richards*, *supra*, 2 C. B. 604. "Although a person may feel sure that if he were in his neighbor's place he would have been most grateful for the information conveyed, still he must recollect that it may eventually turn out that, in endeavoring to avert a fancied injury to his neighbor, he has really inflicted an undoubted and undeserved injury on another." *Newell on Slander & Libel* (3d Ed.) § 576.

²⁵⁸ *Nix v. Caldwell*, 81 Ky. 297, 50 Am. Rep. 163; *Shurtleff v. Parker*, 130 Mass. 293, 39 Am. Rep. 454; *Krebs v. Oliver*, 12 Gray (Mass.) 239; *Hancock v. Blackwell*, 139 Mo. 440, 41 S. W. 205; *Byam v. Collins*, 111 N. Y. 143, 19 N. E. 75, 2 L. R. A. 129, 7 Am. St. Rep. 726; *Dillard v. Collins*, 25 Grat. (Va.) 343; *Brown v. Vannaman*, 85 Wis. 451, 55 N. W. 183, 39 Am. St. Rep. 860. Cf. *Hart v. Reed*, 1 B. Mon. (Ky.) 166, 35 Am. Dec. 179; *Hubbard v. Rutledge*, 57 Miss. 7, which it is submitted were incorrectly decided.

²⁵⁹ *Cole v. Wilson*, 18 B. Mon. (Ky.) 212; *Hines v. Shumaker*, 97 Miss. 669, 52 South. 705; *Sullivan v. Strathan-Hutton-Evans Commission Co.*, 152 Mo. 268, 53 S. W. 912, 47 L. R. A. 859; *Lathrop v. Sundberg*, 55 Wash. 144, 104 Pac. 176, 25 L. R. A. (N. S.) 381; *Na-*

whom the statement is published must be those to whom the information should be given, and, where the publication is to strangers, the defendant will generally be held accountable.²⁰⁰ Still privilege will not invariably be denied solely for this reason, for the test is whether unnecessary publicity has been given.²⁰¹ Hence, where one is protected in making a communication to another, he is not bound at his peril to wait until the latter is alone. The casual presence of strangers will not be enough to render him responsible,²⁰² though it is equally true that he cannot seek out an occasion when others are present, so as to gratify his malice or sense of the dramatic.²⁰³ Nor if the occasion warrants wider dissemination, as where a master causes notice of a servant's dismissal to be published in a newspaper which circulates among his customers,²⁰⁴ will the defendant be responsible merely because the matter may incidentally have been brought to the attention of parties not interested, or because there may be a small circulation among them.²⁰⁵

tional Cash Register Co. v. Salling, 173 Fed. 22, 97 C. O. A. 334; *Fryer v. Kinnerley*, 15 C. B. N. S. 422. See *Burch v. Bernard*, 107 Minn. 210, 120 N. W. 33; *Wallace v. Jameson*, 179 Pa. 98, 36 Atl. 132.

²⁰⁰ *Flynn v. Boglarsky*, 164 Mich. 513, 129 N. W. 674, 32 L. R. A. (N. S.) 740; *Woods v. Wiman*, 122 N. Y. 445, 25 N. E. 919; *Philadelphia, W. & B. R. Co. v. Quigley*, 21 How. 202, 16 L. Ed. 73. And see cases hereafter cited.

²⁰¹ *Sheftall v. Central of Georgia Ry. Co.*, 123 Ga. 589, 51 S. E. 646.

²⁰² *BROW v. HATHAWAY*, 13 Allen (Mass.) 239, Chapin Cas. Torts, 175; *Fahr v. Hayes*, 50 N. J. Law, 275, 13 Atl. 261; *Broughton v. McGrew* (C. C.) 39 Fed. 676, 5 L. R. A. 406; *Toogood v. Spryng*, 1 Crompt. M. & R. 181.

²⁰³ *Kruse v. Rabe*, 80 N. J. Law, 378, 79 Atl. 316, 33 L. R. A. (N. S.) 469, Ann. Cas. 1912A, 477; *Fields v. Bynum*, 156 N. C. 413, 72 S. E. 449; *Parsons v. Surgey*, 4 F. & F. 247. See *Massee v. Williams*, 207 Fed. 222, 124 C. O. A. 492.

²⁰⁴ *Hatch v. Lane*, 105 Mass. 394.

²⁰⁵ *Coleman v. MacLennan*, 78 Kan. 711, 98 Pac. 281, 20 L. R. A. (N. S.) 361, 130 Am. St. Rep. 390; *Redgate v. Roush*, 61 Kan. 480, 59 Pac. 1050, 48 L. R. A. 236; *Mertens v. Bee Pub. Co.* (1904) 5 Neb. Unof. 592, 99 N. W. 847; *Arnold v. Ingram*, 151 Wis. 438, 138 N. W. 111, Ann. Cas. 1914C, 976; cf. *Cunningham v. Underwood*, 116 Fed. 803, 53 C. C. A. 99. Aliter, if the circulation among non-inter-

One cannot communicate by telegram,²⁶⁶ or post card,²⁶⁷ or publish in a newspaper²⁶⁸ matter which can easily be communicated by sealed letter; but it would seem that unnecessary publicity is not given to privileged matter contained in a letter to the party interested, merely because it is dictated to a stenographer or clerk, or copied in a letter book.²⁶⁹

Malice

It has been seen²⁷⁰ that, where an unlawful act is done intentionally without just cause or excuse, the motive of the doer is deemed wrongful or malicious, a doctrine applicable quite as much to defamation as to other torts.²⁷¹ Ordinarily the existence of this "malice in law," as it is termed, is conclusively presumed; but in cases of comment,²⁷² and conditional privilege,²⁷³ it is otherwise. Here

ested parties is large. *Jones, Varnum & Co. v. Townsend's Adm'r*, 21 Fla. 431, 58 Am. Rep. 676.

²⁶⁶ *Williamson v. Freer*, L. R. 9 C. P. 393. Cf. *Edmonston v. Birch & Co., Ltd.*, [1907] 1 K. B. 371, 7 Am. & Eng. Ann. Cas. 192. Aliter, where plaintiff requested answer by wire. *Ashcroft v. Hammond*, 197 N. Y. 488, 90 N. E. 1117.

²⁶⁷ Cf. *Sadgrove v. Hole*, [1901] 2 K. B. 1.

²⁶⁸ *Lathrop v. Sundberg*, 55 Wash. 144, 104 Pac. 176, 25 L. R. A. (N. S.) 381.

²⁶⁹ *Edmonston v. Birch & Co., Ltd.*, L. R. (1907) 1 K. B. 371, 7 Am. & Eng. Ann. Cas. 192; *Boxsius v. Goblet Frères*, L. R. (1894) 1 Q. B. 842. But see *Gambrill v. Schooley*, 93 Md. 48, 48 Atl. 730, 52 L. R. A. 88, 86 Am. St. Rep. 414; *Pullman v. Hill & Co.*, L. R. (1891) 1 Q. B. 524.

²⁷⁰ See *supra*, p. 66.

²⁷¹ *Childers v. San Jose Mercury Printing & Publishing Co.*, 105 Cal. 284, 38 Pac. 903, 45 Am. St. Rep. 40; *Gambrill v. Schooley*, 95 Md. 260, 52 Atl. 500, 63 L. R. A. 427; *King v. Patterson*, 49 N. J. Law, 417, 9 Atl. 705, 60 Am. Rep. 622; *Neeb v. Hope*, 111 Pa. 145, 2 Atl. 568; *Brueshaber v. Hertling*, 78 Wis. 498, 47 N. W. 725. "Malice in common acceptation means ill will against a person, but in its legal sense it means a wrongful act done intentionally without just cause or excuse." *Bromage v. Prosser*, 4 B. & C. 247, 255, per Bayley, J.

²⁷² *Cherry v. Des Moines Leader*, 114 Iowa, 298, 86 N. W. 323, 54 L. R. A. 855, 89 Am. St. Rep. 365; *Thomas v. Bradbury Agnew & Co., Ltd.*, [1906] 2 K. B. D. 627. See *Battersby v. Collier*, 34 App. Div.

²⁷³ See note 273 on following page.

there is rebutted the inference *prima facie* arising from a statement prejudicial to the character of the plaintiff, and the burden is put upon him to prove that there was malice.²⁷⁴ This is known as "malice in fact." It is not necessarily actual spite or malevolence towards the plaintiff, though this will, of course, be sufficient. It is better defined negatively as the absence of a proper motive. What motive is proper depends upon the reason for legal recognition of the defense invoked. Whatever such reason may be, e. g., enlightenment of the public, subservance of an interest, performance of duty, etc., if the defendant acted for any other reason, or was prompted by an indirect motive, malice in fact is established.²⁷⁵ There seems no reason for requiring that the motive be inherently wrong. It should be enough that it is not the motive which the law recognizes,²⁷⁶ as if it be to create a sensation or increase the circulation of a newspaper.²⁷⁷ Frequently the courts have referred to "malice in fact" as "actual malice," or "express malice." This is unfortunate, since the use of the latter expressions is calculated to induce a belief that personal spite or malevolence is essential.

Whether the occasion is privileged, or is such that com-

347, 54 N. Y. Supp. 363. But cf. *Merrey v. Guardian Printing & Publishing Co.*, 79 N. J. Law, 177, 184, 74 Atl. 464.

²⁷⁴ *Kirkpatrick v. Eagle Lodge No. 32*, 26 Kan. 364, 40 Am. Rep. 316; *Gassett v. Gilbert*, 6 Gray (Mass.) 94; *Hebner v. Great Northern Ry. Co.*, 78 Minn. 289, 80 N. W. 1128, 79 Am. St. Rep. 387; *Fahr v. Hayes*, 50 N. J. Law, 275, 13 Atl. 261; *Klinck v. Colby*, 46 N. Y. 427, 7 Am. Rep. 360; *Gattis v. Kilgo*, 140 N. C. 106, 52 S. E. 249.

²⁷⁵ See *Wright v. Woodgate*, 2 C. M. & R. 573, 577; *Jackson v. Hopperton*, 12 Wkly. Rep. 913.

²⁷⁶ See *Ramsey v. Cheek*, 109 N. C. 270, 13 S. E. 775; *Clark v. Molyneux*, 47 L. J. Q. B. 230, 237; *Royal Aquarium, etc., Soc., Ltd., v. Parkinson*, [1892] 1 Q. B. 431, 443. Cf. *Fahr v. Hayes*, 50 N. J. Law, 275, 13 Atl. 261.

²⁷⁷ See *Lowry v. Vedder*, 40 Minn. 475, 42 N. W. 542.

²⁷⁸ Cf. *McNally v. Burlleigh*, 91 Me. 22, 39 Atl. 285; *Maclean v. Scripps*, 52 Mich. 214, 17 N. W. 815, 18 N. W. 209. But in *McClure v. Review Pub. Co.*, 38 Wash. 160, 80 Pac. 303, it was considered insufficient to show malice that the desire was "only to publish sensational news in a sensational and somewhat flamboyant and embellished style."

ment is permissible, is for the court, though the jury decide disputed facts out of which the occasion is asserted to arise. Malice and the fairness of comment is for the jury,²⁷⁸ subject to the court's usual power to nonsuit or to direct a verdict.²⁷⁹ "In general, evidence of any act or circumstance tending to show the want of good faith may be offered" to establish malice.²⁸⁰ Such, for instance, are declarations indicating hostility towards plaintiff,²⁸¹ repetition of the defamatory words to others on different occasions,²⁸² the use of strong or violent language disproportionate to the occasion,²⁸³ and not required to accomplish a legitimate purpose,²⁸⁴ the publication of criticism in a portion of defendant's journal not usually devoted to book reviews,²⁸⁵ and facts showing that defendant knew, or had reason to know, that his statement was untrue.²⁸⁶ Cases illustrating other methods of proving malice are given in the note.²⁸⁷

²⁷⁸ Privilege: *Atwater v. Morning News Co.*, 67 Conn. 504, 34 Atl. 865; *BROW v. HATHAWAY*, 13 Allen (Mass.) 239, Chapin Cas. Torts, 175; *Klinck v. Colby*, 46 N. Y. 427, 7 Am. Rep. 360; *Ramsey v. Cheek*, 109 N. C. 270, 13 S. E. 775; *Mauk v. Brundage*, 68 Ohio St. 89, 67 N. E. 152, 62 L. R. A. 477. Comment: *Fullerton v. Thompson*, 123 Minn. 136, 143 N. W. 260; *Merrey v. Guardian Printing & Publishing Co.*, 79 N. J. Law, 177, 74 Atl. 464; *Arnold v. Ingram*, 151 Wis. 438, 138 N. W. 111, Ann. Cas. 1914C, 976.

²⁷⁹ *Myers v. Hodges*, 53 Fla. 197, 44 South. 357; *Ashcroft v. Hammond*, 197 N. Y. 488, 90 N. E. 1117; *Gattis v. Kilgo*, 128 N. C. 402, 38 S. E. 931. Cf. *BROW v. HATHAWAY*, 13 Allen (Mass.) 239, Chapin Cas. Torts, 175.

²⁸⁰ *Garrett v. Dickerson*, 19 Md. 418, 450, per Cochran, J.

²⁸¹ *Harris v. Zanone*, 93 Cal. 59, 28 Pac. 845; *Garrett v. Dickerson*, supra; *Byrd v. Hudson*, 113 N. C. 203, 18 S. E. 209. See *Fry v. Bennett*, 28 N. Y. 324.

²⁸² *Harris v. Zanone*, supra.

²⁸³ *Farley v. Thalheimer*, 103 Va. 504, 49 S. E. 644. But some allowance may be made for honest indignation. See *Fahr v. Hayes*, 50 N. J. Law, 275, 13 Atl. 261; *Myers v. Hodges*, 53 Fla. 197, 44 South. 357; *Massee v. Williams*, 207 Fed. 222, 124 C. C. A. 492.

²⁸⁴ *Gassett v. Gilbert*, 6 Gray (Mass.) 94. And see supra, p. 324.

²⁸⁵ See *Thomas v. Bradbury, Agnew & Co.*, [1906] 2 K. B. D. 627.

²⁸⁶ *Wagner v. Scott*, 164 Mo. 289, 63 S. W. 1107; *Laing v. Nelson*, 40 Neb. 252, 58 N. W. 846; *Harwood v. Keech*, 6 Thomp. & C. (N. Y.) 665.

²⁸⁷ *Atwater v. Morning News Co.*, 67 Conn. 504, 34 Atl. 865;

PARTIAL DEFENSES

74. Though a complete defense be lacking, yet defendant may be permitted to introduce evidence to affect the amount of the recovery. There are such differences in practice that this matter cannot be considered at any length. In general, it may be said that "two classes of facts are pleadable and provable in mitigation of damages: First, such as impeach the character of the plaintiff; secondly, such as tend to negative the malicious motive of the defendant."²⁸⁸

With respect to the first, it is evident that the effect of the proof may be to lessen compensatory damages. Plaintiff has complained of an injury to his reputation. Upon what scale are damages to be assessed, except with reference to the value of the article injured?²⁸⁹ Naturally this means plaintiff's reputation at the time he was defamed, as the inferior quality of his subsequent reputation might be due to defendant's wrong.²⁹⁰ Evidence of a rumor or report that plaintiff had been guilty of the act charged cannot, it has been held, be received, since defendant is thereby attempting to show, "not that plaintiff's general reputation was bad, but that in a single instance he was generally reputed to have behaved badly,"²⁹¹ though it is evident that rumor may be so generally diffused as to affect

Mielenz v. Quasdorf, 68 Iowa, 726, 28 N. W. 41; *Bodwell v. Osgood*, 3 Pick. (Mass.) 379, 15 Am. Dec. 228, note; *Hubbard v. Rutledge*, 57 Mass. 7; *Millissich v. Lloyds*, 13 Cox, Cr. Cas. 575.

²⁸⁸ *Witcher v. Jones* (Com. Pl.) 17 N. Y. Supp. 491, per Pryor, J., affirmed 137 N. Y. 599, 33 N. E. 743; *Storey v. Early*, 86 Ill. 461.

²⁸⁹ *Adams v. Smith*, 58 Ill. 417; *Clark v. Brown*, 116 Mass. 504; *Georgia v. Bond*, 114 Mich. 196, 72 N. W. 232; *Sayre v. Sayre*, 25 N. J. Law, 235; *Paddock v. Salisbury*, 2 Cow. (N. Y.) 811; *Bridgman v. Hopkins*, 84 Vt. 532.

²⁹⁰ *Haag v. Cooley*, 83 Kan. 387, 6 Pac. 585; *Calkins v. Colburn*, 10 N. Y. St. Rep. 778. Cf. *Thompson v. Nye*, 15 Jur. 285.

²⁹¹ *Mahoney v. Belford*, 132 Mass. 393, 394, per Devens, J. In accord, *Scott v. McKinnish*, 15 Ala. 662; *Dame v. Kenney*, 25 N. H.

reputation.²⁹³ Nor is evidence of other and disconnected immoralities admissible,²⁹³ since its only tendency "is to show, not that the plaintiff's reputation is bad, but that it ought to be bad."²⁹⁴ But there seems no good reason why plaintiff's character, as distinguished from reputation, may not be shown by evidence of his course of conduct, for the purpose of affecting the amount of recovery for mental suffering.²⁹⁵ In cases of the second class the evidence is offered for the purpose of preventing or reducing the recovery of exemplary damages.²⁹⁶ Defendant's good faith is here an important fact, and hence he is usually permitted to show that, at the time he made the charge, he had knowledge of facts which afforded reasonable grounds of belief.²⁹⁷ Thus evidence that similar charges were pre-

318; *Kennedy v. Gifford*, 19 Wend. (N. Y.) 296; *Pease v. Shippen*, 80 Pa. 513, 21 Am. Rep. 116.

²⁹² *Bllickenstaff v. Perrin*, 27 Ind. 527; *Wetherbee v. Marsh*, 20 N. H. 561, 51 Am. Dec. 244; *Stuart v. News Pub. Co.*, 67 N. J. Law, 317, 51 Atl. 709; *Earl of Leicester v. Walter*, 2 Campb. 251; cf. *Shilling v. Carson*, 27 Md. 175, 92 Am. Dec. 632; *Inman v. Foster*, 8 Wend. (N. Y.) 602. But see *Hatfield v. Lasher*, 81 N. Y. 246.

²⁹³ *Bergstrom v. Ridgway Co.*, 138 App. Div. 178, 123 N. Y. Supp. 29.

²⁹⁴ *Sun Printing & Publishing Ass'n v. Schenck*, 98 Fed. 925, 929, 40 C. C. A. 163, per Wallace, J.

²⁹⁵ "It follows as the day the night that if the person libeled is an abandoned character, if she or he lacks the sensibilities of a pure and upright person, such a person necessarily suffers less in mind than one who possesses such qualities." *Osterheld v. Star Co.*, 146 App. Div. 388, 393, 131 N. Y. Supp. 247, per Woodward, J. To the same effect, *Elfert v. Sawyer*, 2 Nott & McC. (S. C.) 511, 10 Am. Dec. 633. Furthermore, where defendant has set up justification and proved some of the facts pleaded, and therefore the truth of some relevant portions of the article, the jurors are at liberty to take them into consideration, in reduction of compensatory damages. *Gressman v. Morning Journal Ass'n*, 197 N. Y. 474, 90 N. E. 1131.

²⁹⁶ *Osterheld v. Star Co.*, 146 App. Div. 388, 131 N. Y. Supp. 247.

²⁹⁷ *Davis v. Hearst*, 160 Cal. 143, 116 Pac. 530; *McCoy v. McCoy*, 106 Ind. 492, 7 N. E. 188; *Mielenz v. Quasdorf*, 68 Iowa, 726, 28 N. W. 41; *Reynolds v. Tucker*, 6 Ohio St. 517, 67 Am. Dec. 353; *Fenstermaker v. Tribune Pub. Co.*, 13 Utah, 532, 45 Pac. 1097, 35 L. R. A. 611. Cf. *Wuensch v. Morning Journal Ass'n*, 4 App. Div. 110, 38 N. Y. Supp. 605; *Young v. Fox*, 26 App. Div. 261, 49 N. Y. Supp. 634.

viously published by others, and that he knew and was influenced thereby, has been received in some courts,²⁹⁹ though by other courts this is rejected in cases where the charge purported to be made as of defendant's own knowledge.³⁰⁰ A retraction, which it seems best to say should be prior to the commencement of the action and not subsequently made,³⁰¹ may likewise bear upon the question of malice, and consequently affect punitive, though not compensatory, damages.³⁰¹ Necessarily the retraction must be adequate, and in determining this point there should be considered the time of its publication, the language used, and

²⁹⁹ *Hay v. Reid*, 85 Mich. 296, 48 N. W. 507; *Hewitt v. Pioneer Press Co.*, 23 Minn. 178, 23 Am. Rep. 680; *Hoboken Printing & Publishing Co. v. Kahn*, 58 N. J. Law, 359, 33 Atl. 382, 1060, 55 Am. St. Rep. 609, note; *McDonald v. Woodruff*, Fed. Cas. No. 8,770, 2 Dill. 244. Provided such charges were known to defendant at the time he published the defamation, *Lothrop v. Adams*, 133 Mass. 471, 43 Am. Rep. 528; *Palmer v. Matthews*, 162 N. Y. 100, 56 N. E. 501; *Hatfield v. Lasher*, 81 N. Y. 246; *Pfister v. Milwaukee Free Press Co.*, 139 Wis. 627, 121 N. W. 938; and at the time of publication he gave the names of such others, *Baldwin v. Boulware*, 79 Mo. App. 5; *De Severinus v. New York Evening Journal Pub. Co.*, 150 App. Div. 342, 134 N. Y. Supp. 664 (semble).

³⁰⁰ *Marker v. Dunn*, 68 Iowa, 720, 28 N. W. 38; *Elliott v. Boyles*, 31 Pa. 65. That defendant need not have stated the sources of his information, see *Fenstermaker v. Tribune Pub. Co.*, 13 Utah, 532, 45 Pac. 1097, 35 L. R. A. 611.

³⁰¹ *Turner v. Hearst*, 115 Cal. 394, 47 Pac. 129; *Storey v. Wallace*, 60 Ill. 51; *Dixie Fire Ins. Co. v. Betty* (1912) 101 Miss. 880, 58 South. 705; *Turton v. New York Recorder Co.*, 144 N. Y. 144, 38 N. E. 1009 (semble). In some states this is specially regulated by statute, as in Alabama (Civ. Code 1907, §§ 3749-3751), Indiana (Burns' Ann. St. 1914, § 380; *White v. Sun Pub. Co.*, 164 Ind. 426, 73 N. E. 890), Massachusetts (Rev. Laws, c. 173, § 92; *Ellis v. Brockton Pub. Co.*, 198 Mass. 538, 84 N. E. 1018, 126 Am. St. Rep. 454, 15 Ann. Cas. 83), Michigan (Howell's Ann. St. [2d Ed.] 1912, § 13138; *Lawrence v. Herald Pub. Co.*, 158 Mich. 459, 122 N. W. 1084, 25 L. R. A. [N. S.] 796), Ohio (Gen. Code 1910, § 11343), and England (6 & 7 Vict. c. 96).

³⁰¹ *De Severinus v. Press Pub. Co.*, 147 App. Div. 161, 132 N. Y. Supp. 80; *Osborn v. Leach*, 135 N. C. 628, 47 S. E. 811, 66 L. R. A. 648. Cf. *Ellis v. Brockton Pub. Co.*, 198 Mass. 538, 84 N. E. 1018, 126 Am. St. Rep. 454, 15 Ann. Cas. 83; *Clementson v. Minnesota Tribune Co.*, 45 Minn. 303, 47 N. W. 781. But it has been said that it tends to decrease the amount of damages which without it plaintiff would

degree of publicity given.³⁰² On the principle on which evidence of provocation is received in a suit for assault and battery, namely, that the law makes allowance for the infirmities of human nature, defendant by the weight of authority may show in mitigation of damages that the words were uttered in the heat of passion, or while in a state of excitement created by the improper conduct of plaintiff,³⁰³ provided the provocation is so recent as to afford a reasonable presumption that the act complained of was done under the influence of the feelings and passions excited thereby.³⁰⁴

Province of Court and Jury

To end a controversy which had been carried on with much bitterness,³⁰⁵ Mr. Fox's Act, passed in 1792,³⁰⁶ de-

have sustained. *Turner v. Hearst*, 115 Cal. 394, 47 Pac. 129; *White v. Sun Pub. Co.*, 164 Ind. 426, 73 N. E. 890.

³⁰² *Lawrence v. Herald Pub. Co.*, 158 Mich. 459, 122 N. W. 1084, 25 L. R. A. (N. S.) 796; *Gray v. Times Newspaper Co.*, 74 Minn. 452, 77 N. W. 204, 73 Am. St. Rep. 363; *Hotchkiss v. Oliphant*, 2 Hill (N. Y.) 510; *Palmer v. Mahin*, 120 Fed. 737, 57 C. C. A. 41; *Lafone v. Smith*, 3 H. & N. 735.

³⁰³ *Shockey v. McCauley*, 101 Md. 461, 61 Atl. 583, 4 Ann. Cas. 921.
³⁰⁴ *Child v. Homer*, 13 Pick. (Mass.) 503; *Quinby v. Minnesota Tribune Co.*, 38 Minn. 528, 38 N. W. 623, 8 Am. St. Rep. 693; *Keller v. American Bottlers' Pub. Co.*, 140 App. Div. 311, 125 N. Y. Supp. 213; *Maynard v. Beardsley*, 7 Wend. (N. Y.) 560, 22 Am. Dec. 595; *Gould v. Weed*, 12 Wend. (N. Y.) 12; *Bourland v. Eldson*, 8 Grat. (Va.) 27.

³⁰⁵ At a period shortly preceding the American Revolution, the relative powers of courts and juries in criminal prosecutions for libel became the subject of impassioned debate. By legal theory, the meaning, effect, and interpretation of all language must be settled by the court. This rule applied to statutes, proclamations, treaties, and other acts of state, also to private contracts of all sorts, and it was urged should likewise be applied to publications charged to be libelous. Hence, if declared to be libelous, it was unlawful, and the innocent intent of the publisher afforded no excuse, since the malicious intent was an inference of law. This left to the jury merely the fact of publication and the truth of the innuendoes. On the other hand, it was maintained that such a view tended to discourage free discussion of public affairs and destroy the freedom of the press; that whether a publication was libelous depended upon the motive or

³⁰⁶ 32 Geo. III, c. 60.

clared that on every trial the jury may give a general verdict of guilty or not guilty upon the whole matter in issue upon the indictment or information, and shall not be required or directed to find the defendant guilty merely on proof of the publication, though the court might give its opinion and directions "in like manner as in other criminal cases." This act, though in terms applicable only to criminal prosecutions, has been extended by the English courts to civil cases.³⁰⁷

Statutes and constitutional provisions similar in tenor, and in terms giving to the jury the right to determine the law and the fact, are in force in many states.³⁰⁸ In some the English view has been adopted,³⁰⁹ though it seems better to limit their operation to criminal prosecutions.³¹⁰ Hence, "where the words are unambiguous and clearly libellous on their face, incapable of an innocent meaning, and the case free from any evidence tending to change their natural meaning, it is both the right and duty of the court in civil actions to instruct the jury as matter of law that they are defamatory."³¹¹

intent with which it was written, which was a question of fact, and hence must be found by the jury. See *Com. v. Anthes*, 5 Gray (Mass.) 185, 213.

³⁰⁷ *Cox v. Lee*, L. R. 4 Exch. 284, 38 L. J. Exch. 219, 21 L. T. Rep. N. S. 178; *Baylis v. Lawrence*, 11 Adol. & El. 920, 9 L. J. Q. B. 196, 4 Jur. 652, 39 E. C. L. 485. Cf. *Campbell v. Spottiswoode*, 3 B. & S. 769. But it is considered that the statute has not affected the power of the court to act in cases where the words are neither intrinsically libelous nor capable of bearing the meaning ascribed to them by innuendo. *Capital & Counties Bank, Ltd., v. Henty*, 7 App. Cas. 741, 47 J. P. 214, 52 L. J. Q. B. 232, 47 L. T. Rep. N. S. 662, 31 Wkly. Rep. 157.

³⁰⁸ See Const. N. J. art. 1, § 5; *Drake v. State*, 53 N. J. Law, 23, 20 Atl. 747; Code Cr. Proc. N. Y. § 418, and cases hereafter cited.

³⁰⁹ *Shattuck v. Allen*, 4 Gray (Mass.) 540, *semble*; *Twombly v. Monroe*, 138 Mass. 464. Cf. *Heller v. Pulitzer Pub. Co.*, 153 Mo. 205, 54 S. W. 457.

³¹⁰ *Thibault v. Sessions*, 101 Mich. 279, 59 N. W. 624; *Hunt v. Bennett*, 19 N. Y. 173; *Pittock v. O'Niell*, 63 Pa. 253, 3 Am. Rep. 544.

³¹¹ *Smith v. Stewart*, 41 Minn. 7, 8, 42 N. W. 595. To the same effect, *Dowie v. Priddle*, 216 Ill. 553, 75 Pac. 243, 3 Ann. Cas. 526; *Hunt v. Bennett*, 19 N. Y. 173; *Gregory v. Atkins*, 42 Vt. 237.

CHAPTER XI

INFRINGEMENT OF PRIVATE PROPERTY—TRESPASS

- 75. Definition.
- 76. Right Invaded.
- 77. Trespass *ab Initio*.
- 78. Remedies.
- 79. Defenses.
- 80. Damages.

DEFINED

75. Trespass as a form of action has already been considered.¹ As a substantive tort, it consists in the wrongful and forcible disturbance of another's possession.

Trespass to Land

This is committed when there has been an unlawful entry.² In its simplest form, it consists of a physical entry upon the soil itself. As thereby a legal right has been infringed, the law will infer some damage—"if nothing more, the treading down the grass or the herbage."³ Thus one may become a trespasser by walking or riding across the land,⁴ or by flooding it,⁵ or by casting objects thereon.⁶ So

¹ See *supra*, p. 45.

² See *Tonawanda R. Co. v. Munger*, 5 Denio (N. Y.) 255, 259, 49 Am. Dec. 239; *DOUGHERTY v. STEPP*, 18 N. C. 371, Chapin Cas. Torts, 179; *Norvell v. Gray's Lessee*, 1 Swan (Tenn.) 96, 103.

³ *DOUGHERTY v. STEPP*, 18 N. C. 371, 372, Chapin Cas. Torts, 179, per Ruffin, C. J. To the same effect, *Empire Gold Min. Co. v. Bonanza Gold Min. Co.*, 67 Cal. 406, 7 Pac. 810; *Brown v. Perkins*, 1 Allen (Mass.) 89; *Brown v. Manter*, 22 N. H. 468, 472.

⁴ *Hatch v. Donnell*, 74 Me. 163; *DOUGHERTY v. STEPP*, 18 N. C. 371, Chapin Cas. Torts, 179.

⁵ *Conner v. Woodfill*, 126 Ind. 85, 25 N. E. 876, 22 Am. St. Rep. 568; *Mairs v. Manhattan Real Estate Ass'n*, 89 N. Y. 498; *Wheeler v. Norton*, 92 App. Div. 368, 86 N. Y. Supp. 1095.

⁶ *Ex parte Birmingham Realty Co.* (1913) 183 Ala. 444, 63 South. 67; *Clark v. Wiles*, 54 Mich. 323, 20 N. W. 63; *Hay v. Cohoes Co.*,

an unwarranted entry by cattle is a trespass,⁷ and the owner is responsible, irrespective of the care which he has exercised in endeavoring to keep them at home,⁸ unless the cattle, while being driven along a highway, have casually wandered on unfenced land bounding thereon, for in that case his negligence must be established.⁹

At common law, with the exception just mentioned,¹⁰ it mattered not that the premises were unfenced. "If a man's

2 N. Y. 163, 51 Am. Dec. 279; *McCahill v. John H. Parker Co.*, 49 Misc. Rep. 258, 97 N. Y. Supp. 398; *Newsom v. Anderson*, 24 N. C. 42, 37 Am. Dec. 408.

⁷ But, if a dog enters without the consent of its master, it is no trespass. *Brown v. Giles*, 1 C. & P. 118, 12 E. C. L. 79. Reasons which have been assigned in the case of dogs and cats are: First, "the difficulty or impossibility of keeping" them "under restraint; secondly, the slightness of the damage which their wandering ordinarily causes; thirdly, the common usage of mankind to allow them a wider liberty; and, lastly, their not being considered in law so absolutely the chattels of the owner as to be the subject of larceny." *Read v. Edwards*, 17 C. B. N. S. 245, 260, per Willes, J.

"Yet if the owner trespass, and while on the land his dog, unbidden and against his will, does mischief, that action [trespass *qu. cl. freg.*] will lie for the injury." *Woolf v. Chalker*, 31 Conn. 121, 129, 81 Am. Dec. 175, per Butler, J. So if the dog alone trespass, and in fact do damage, proof of scienter is unnecessary in an action brought by the owner of the close. The ground of liability here rests upon the breach of the close, and the damage is alleged by way of aggravation. *Chunot v. Larson*, 43 Wis. 536, 28 Am. Rep. 567, note. Cf. *Van Leuven v. Lyke*, 1 N. Y. 515, 49 Am. Dec. 346, *Buchanan v. Stout*, 139 App. Div. 204, 123 N. Y. Supp. 724; *Decker v. Gammon*, 44 Me. 322, 69 Am. Dec. 99 (trespassing horse). In *Sanders v. Teape*, 51 L. T. Rep. N. S. 263, proof of scienter was deemed requisite, but it does not appear that plaintiff was the owner of the close.

⁸ See *McBride v. Lynd*, 55 Ill. 411; *Tonawanda R. Co. v. Munger*, 5 Denio (N. Y.) 255, 49 Am. Dec. 239; *Rossell v. Cottom*, 31 Pa. 525. There can necessarily be no liability where the cattle have been driven upon plaintiff's land by a stranger. *Hartford v. Brady*, 114 Mass. 466, 19 Am. Rep. 377.

⁹ *Hartford v. Brady*, 114 Mass. 466, 19 Am. Rep. 377; *Tillett v. Ward* (1882) L. R. 10 Q. B. 17.

¹⁰ But this exception does not include a case where, after entering upon a close bounding on the highway, the cattle proceed into another adjoining thereto. *Lord v. Wormwood*, 29 Me. 282, 1 Am. Rep. 596; *McDonnell v. Pittsfield & N. A. R. Corp.*, 115 Mass. 564; *Wood v. Snider*, 187 N. Y. 28, 79 N. E. 858, 12 L. R. A. (N. S.) 912.

land be not inclosed, the law encircles it with an imaginary inclosure, to pass which is to break and enter his close. The mere act of breaking through this imaginary boundary constitutes a cause of action, as being a violation of the right of property."¹¹ In some of the states, however, it has been held that this doctrine could not be applied to conditions in this country,¹² and in others, statutory changes have been made.¹³

The entry need not be upon the soil, for by the ancient maxim, which has been applied in such cases, "*cujus est solum ejus est usque ad cælum et ad inferos.*"¹⁴ "The surface of the ground," it is said, "is a guide, but not the full measure, for within reasonable limitations land includes not only the surface, but also the space above and the part beneath."¹⁵ Hence it has been held that the tort may be committed, not only by interfering with minerals,¹⁶ but by such acts as thrusting an arm across the boundary,¹⁷ or hanging a wire¹⁸ or structure over the land.¹⁹

¹¹ *Agnew v. Jones*, 74 Miss. 347, 352, 23 South. 25, per Stockdale, J. To the same effect, *Wells v. Howell*, 19 Johns. (N. Y.) 385, *Blieu v. Paisley*, 18 Or. 47, 21 Pac. 934, 4 L. R. A. 840.

¹² *Mobile & O. R. Co. v. Williams*, 53 Ala. 595; *Wagner v. Bissell*, 3 Iowa, 396; *Pace v. Potter*, 85 Tex. 473, 22 S. W. 300. Contra, where the cattle are not running at large, but are knowingly driven upon another's land. *Harrison v. Adamson*, 76 Iowa, 337, 41 N. W. 34; *Poindexter v. May*, 98 Va. 143, 34 S. E. 971, 47 L. R. A. 588.

¹³ E. g., *Consol. Laws N. Y. c. 62, § 361*, as amended by *Laws 1911, c. 86*.

¹⁴ "He who owns the soil also owns to the heavens and to the depths."

¹⁵ *Butler v. Frontier Telephone Co.*, 186 N. Y. 486, 491, 79 N. E. 716, 11 L. R. A. (N. S.) 920, 116 Am. St. Rep. 563, 9 Ann. Cas. 858, per Vann, J.

¹⁶ *Maye v. Yappen*, 23 Cal. 306; *United States v. Magoon*, 3 McLean, 171, Fed. Cas. No. 15,707; *Morgan v. Powell*, 2 G. & D. 721.

¹⁷ *HANNABALSON v. SESSIONS*, 116 Iowa, 457, 90 N. W. 93, 93 Am. St. Rep. 250, *Chapin Cas. Torts*, 180. To the same effect, *Ellis v. Loftus Iron Co.*, L. R. 10 C. P. 10, 44 L. J. C. P. 24, 31, L. T. Rep. N. S. 483, 23 Wkly. Rep. 246, where defendant's horse stretched its neck across the boundary.

¹⁸ See *Butler v. Frontier Telephone Co.*, 186 N. Y. 486, 79 N. E. 716, 11 L. R. A. (N. S.) 920, 116 Am. St. Rep. 563, 9 Ann. Cas. 858.

¹⁹ *Esty v. Baker*, 48 Me. 495 (shaft); *Smith v. Smith*, 110 Mass.

Is it to be concluded from this that one is a trespasser if he passes over another's land in a balloon or airship? In 1815 Lord Ellenborough expressed a doubt whether any action would lie.²⁰ Later it was observed by Justice Blackburn: "I understand the good sense of that doubt, though not the legal reason of it."²¹ Direct judicial authority is lacking.²² It has been urged that the air should be treated like the waters of the open sea; but the analogy is imperfect, for there is no paramount sovereignty over the latter, as distinguished from that which exists over the individual navigator, while it cannot be questioned that the state may exercise authority over the atmosphere above its soil. It would therefore seem that it is more like the case of a navigable lake or river wholly within the borders of a single country. But, irrespective of the correctness of the analogy, the doctrine of free passage—i. e., that aerial flight is not *per se* trespass—would seem in accord with sound policy.

Then the question arises as to the liability for damage actually suffered. Is proof of negligence essential? If articles have been dropped, we have a recognized case of trespass. Suppose, however, that the soil is untouched, as if cattle are injured by an anchor dragged through the air. The fact that a technical entry may not constitute trespass is not inconsistent with absolute liability for actual damage.²³ This means that the aviator proceeds at his peril. The law may give him a license to pass, but not to do injury. But the subject may be presented in so many varying phases that adequate discussion within the compass of this

302 (eaves of barn). Cf. *Bybee v. State*, 94 Ind. 443, 48 Am. Rep. 175 (passageway); *Reimer's Appeal*, 100 Pa. 182, 45 Am. Rep. 373 (bay window). And see *supra*, p. 71.

²⁰ *Pickering v. Rudd*, 1 Stark. 56, 4 Campb. 219, 16 Rev. Rep. 777, 2 E. C. L. 32.

²¹ *Kenyon v. Hart*, 6 B. & S. 249, 252, 11 Jur. N. S. 602, 34 L. J. M. C. 87, 11 L. T. Rep. N. S. 733, 13 Wkly. Rep. 406, 118 E. C. L. 249.

²² Cf. *Guille v. Swan*, 19 Johns. (N. Y.) 381, 10 Am. Dec. 234; *Wandsworth v. United Tel. Co.*, 13 Q. B. D. 904, 919, 48 J. P. 676, 53 L. J. Q. B. 444, 51 L. T. Rep. N. S. 148, 32 Wkly. Rep. 776.

²³ As in the case of entry by a dog or cat.

work is impossible. In two states, at least, there have been attempts to regulate liability by statute.²⁴

It has been seen that there may be trespass where objects are thrown upon the premises. Is it essential that there should have been an entry by means of what, for want of a better term, may be described as a material substance? It has been thought that it might be trespass if gas, smoke, or bad odors are sent across the border line, or even if the sounds of a hurdy gurdy or fog horn assail the ears of the owner of adjacent property while he is thereon.²⁵ Indeed, it has been said that "trespass may be committed by the projection of force beyond the boundary of the lot where the projecting instrument is operated,"²⁶ and the doctrine applied where a municipal corporation operated a pumping station of such power as to exhaust the subsurface water in contiguous territory.²⁷ If this is correct, it is difficult to understand why the same court should have decided that there could be no recovery for injuries to a building caused by concussion produced by blasting, in the absence of proof of negligence, as the projection of the force causing the concussion was not here to be deemed a trespass.²⁸ Appar-

²⁴ See "Aerial Navigation," 2 C. J. 298 et seq. "Every aeronaut shall be responsible for all damages suffered in this state by any person from injuries caused by any voyage in an airship directed by such aeronaut; and if he be the agent or employé of another in making such voyage, his principal or employer shall be responsible for such damage." Laws Conn. 1911, c. 86, § 11. "When flying over buildings, persons or animals, an aviator shall fly at such altitude as will best conduce to the safety of those below him as well as to the safety of himself and his passengers, if he be carrying passengers. He shall be held liable for injuries resulting from his flying unless he can demonstrate that he had taken every reasonable precaution to prevent such injury." St. Mass. 1913, c. 663, § 6.

²⁵ See *Donahue v. Keystone Gas Co.*, 181 N. Y. 313, 317, 73 N. E. 1108, 70 L. R. A. 761, 106 Am. St. Rep. 549; *Shellabarger v. Morris*, 115 Mo. App. 566, 91 S. W. 1005.

²⁶ *Forbell v. City of New York*, 164 N. Y. 522, 526, 58 N. E. 644, 51 L. R. A. 695, 79 Am. St. Rep. 666.

²⁷ *Forbell v. City of New York*, *supra*.

²⁸ *Holland House Co. v. Baird*, 169 N. Y. 136, 62 N. E. 149; *Booth v. Rome, W. & O. T. R. Co.*, 140 N. Y. 267, 35 N. E. 592, 24 L. R. A. 105, 37 Am. St. Rep. 552. Cf. *Colton v. Onderdonk*, 69 Cal. 155, 10 Pac. 395, 58 Am. Rep. 566.

ently greater weight has been given to attraction than to propulsion.²⁹

Trespass to Personalty

Possession may be disturbed where there has been a taking. Thus it is a technical trespass unlawfully to unhitch a horse from one post and lead him to another. True, only slight force was exerted; but no particular degree is

²⁹ The view that trespass may be committed by means of substances not material would seem open to serious objection. When soot or cinders are deposited, there is, of course, a physical entry. Is gas to be put upon the same plane? It seems established that here proof of negligence is essential to recovery. *Emerson v. Lowell Gas Light Co.*, 3 Allen (Mass.) 410; *Koelsch v. Philadelphia Co.*, 152 Pa. 355, 25 Atl. 522, 18 L. R. A. 759, 34 Am. St. Rep. 653; *Butcher v. Providence Gas Co.*, 12 R. I. 149, 34 Am. Rep. 626. *Thompson on Negligence*, vol. 1, § 719. But negligence is not involved in trespass. Should there be a different rule, even when the gas is ponderable—e. g., chlorine? If an entry may be made by noise, then every noise, however slight, must technically give a cause of action, since, once an entry is established, its extent is immaterial, except as governing the quantum of damages. If the projection of a ray cast by a searchlight will constitute trespass, there must likewise be trespass where a mirror is so located as to deflect sunlight. Then will the principle be the same where one places on his own premises an indecent picture, or libelous writing, which is visible to the owner of adjacent property, or exposes an object calculated to frighten the latter's cattle. In each case, whether the medium be searchlight, mirror, picture, writing, or object, the defendant has made use of a form of energy which travels and produces results beyond his own borders. In each case the light waves are made to strike upon the retina of the eye, and, in the language of the New York Court of Appeals in the *Forbell Case*, it is a "projection of force beyond the boundary of the lot where the projecting instrument is operated." If this seems absurd, then it may be asked whether there is any difference between the projection of light waves and the projection of sound waves? Furthermore, if attraction is to be deemed equivalent to propulsion, is there much, if any, difference between attracting subsurface water across the border line by means of a pump, which creates a vacuum, and attracting a neighbor's cattle by means of offered grain? The difficulty seems to be that, when once it is held that there may be an entry by other than material substances, we are brought to an absurd conclusion, and it would seem better to hold that, although an action may lie for nuisance, it cannot, under such circumstances, be brought on the theory of trespass.

here required in order to give a cause of action.³⁰ But asportation is not essential, for trespass may be committed by other acts of manual interference, as by striking or killing,³¹ or by otherwise forcibly injuring or destroying the chattel.³² The force need not be applied directly, however, as if one should deliberately frighten a horse, causing it to run away.³³ So a Sheriff or Constable will be a trespasser, if he make an unlawful attachment or levy, and take the property under his control, though there was no manual seizure or removal.³⁴

³⁰ *Bruch v. Carter*, 32 N. J. Law, 554. Cf. *Gilman v. Emery*, 54 Me. 460, where the removal of the horse was lawful. For other instances of taking, see *Rich v. Johnson*, 61 Ind. 246; *Stanley v. Gaylord*, 1 Cush. (Mass.) 536, 48 Am. Dec. 643; *Peeples v. Brown*, 42 S. C. 81, 20 S. E. 24; *Dexter v. Cole*, 6 Wis. 319, 70 Am. Dec. 465; *Guttner v. Pacific Steam Whaling Co. (D. C.)* 96 Fed. 617.

³¹ *Parker v. Mise*, 27 Ala. 480, 62 Am. Dec. 776; *Wright v. Clark*, 50 Vt. 130, 28 Am. Rep. 496; *Dand v. Sexton*, 3 T. R. 37; *Wright v. Ramscot*, 1 Saund. 84. Cf. *Slater v. Swan*, 2 Str. 872, where Raymond, C. J., said that an action on the case for beating a horse differed from trespass *vi et armis* for assaulting a man, for "here the assault on the horse is no cause of action unless accompanied with a special damage." To the same effect, *Dubuc de Marentille v. Oliver*, 2 N. J. Law, 379. In *Marlow v. Weeks*, Barnes' Notes, 452, decided in the Common Pleas, in 1744, it was said that "for an injury to a beast a writ in trespass *vi et armis* appears in the Register"; but Professor James Barr Ames observes in a note to that case, in his selection of Cases on Torts, vol. 1, p. 61, that: "There seems to be no such writ in the Register. Trespass for the asportation or destruction of a chattel are the only writs for trespass affecting personal property. Other injuries to chattels were doubtless deemed of too trivial a nature to warrant a proceeding in the King's Court, and were redressed in the inferior courts."

³² *Post v. Munn*, 4 N. J. Law, 61, 7 Am. Dec. 570; *Brittain v. McKay*, 23 N. C. 265, 35 Am. Dec. 738.

³³ *Cole v. Fisher*, 11 Mass. 137; *James v. Caldwell*, 7 Yerg. (Tenn.) 38; *Loubz v. Hafner*, 12 N. C. 185; *Waterman v. Hall*, 17 Vt. 128, 42 Am. Dec. 484.

³⁴ *Miller v. Baker*, 1 Metc. (Mass.) 27; *Morse v. Hurd*, 17 N. H. 246; *WINTRINGHAM v. LAFOY*, 7 Cow. (N. Y.) 735, Chapin Cas. Torts, 181; *Welsh v. Bell*, 32 Pa. 12. Contra, however, where the property was not taken under the officer's control. *Rand v. Sargent*, 23 Me. 326, 39 Am. Dec. 625. See *Hollister v. Goodale*, 8 Conn. 332, 21 Am. Dec. 674; *Havely v. Lowry*, 30 Ill. 446; *Rix & Stafford v. Silknitter*, 57 Iowa, 262, 10 N. W. 653; *Lyon v. Rood*, 12 Vt. 233.

NATURE OF RIGHT INVADED

76. Possession, actual or constructive, is required in order to maintain trespass.

If the owner of land is actually occupying it at the time the trespass is committed, there can, of course, be no question as to his right to bring the action.³⁵ So the owner of vacant land is deemed to have a constructive possession which will entitle him to sue.³⁶ But, since trespass is an injury to the possession, as distinguished from the title, it will be otherwise where some third person is holding adversely.³⁷ The occupation must, however, be adverse, and not in subordination to the possession of the owner, in order that the latter may be precluded from maintaining trespass,³⁸ though this does not mean that the occupant must have claimed fee rights.³⁹ In such a case the cause

³⁵ Thus a title obtained by adverse possession is sufficient. *Farmer v. Lyons*, 87 Ky. 421, 9 S. W. 248; *Hart v. Doyle*, 128 Mich. 257, 87 N. W. 219.

³⁶ *Church v. Meeker*, 34 Conn. 421; *Miller v. Miller*, 41 Md. 623; *Randall v. Sanders*, 87 N. Y. 578; *Irwin v. Patchen*, 164 Pa. 51, 30 Atl. 436; *Snider v. Myers*, 3 W. Va. 195. Cf. *Stone v. New England Box Co.*, 216 Mass. 8, 102 N. E. 949.

³⁷ *Dalsey v. Hudson*, 5 Har. (Del.) 320; *Hawkins v. Roby*, 77 Mo. 140; *Bacon v. Sheppard*, 11 N. J. Law, 197, 20 Am. Dec. 583. Cf. *Carter v. Pitcher*, 87 Hun, 580, 34 N. Y. Supp. 549.

³⁸ *Garrett v. Sewell*, 108 Ala. 521, 18 South. 737; *Chesley v. Brockway*, 34 Vt. 550. Thus the owner may bring trespass where the premises are held by his agent, *McColman v. Wilkes*, 3 Strob. (S. C.) 465, 51 Am. Dec. 637; or cotenant in common, *Jewett v. Whitney*, 43 Me. 242; or by one who has entered under a contract to purchase, *Adams v. Farr*, 2 Hun (N. Y.) 473; *Id.*, 5 Thomp. & C. (N. Y.) 59; or by one having a mere license to raise crops not amounting to a tenancy, *Warner v. Hoisington*, 42 Vt. 94. Contra, where there is a tenancy at will, *Hersey v. Chapin*, 162 Mass. 176, 38 N. E. 442; *Gunsolus v. Lormer*, 54 Wis. 630, 12 N. W. 62. But see *Davis v. Nash*, 32 Me. 411; *Starr v. Jackson*, 11 Mass. 519.

³⁹ Thus the tenant has an occupation inconsistent with the occupation of the landlord, though he holds in subordination to the latter's title. Since the occupation is therefore in fact in the tenant, the latter alone can maintain trespass. *Lyford v. Toothaker*, 39 Me. 28;

of action is in the occupant or squatter,⁴⁰ and the latter's possession, if actual and exclusive,⁴¹ though without a legal title, is sufficient, except as against one who can himself show a legal right to immediate possession.⁴² "Any possession is a legal possession against a wrongdoer."⁴³

As a reversioner or remainderman has neither possession nor the right thereto, he is in no position to maintain trespass, though if there had been damage, which impaired the value of the reversion or remainder, the common law gave him an action in case if the wrong was done by a

Bascom v. Dempsey, 143 Mass. 409, 9 N. E. 744; *Wentworth v. Portsmouth & D. R. R.*, 55 N. H. 540; *New Jersey Midland Ry. Co. v. Van Syckle*, 37 N. J. Law, 496; *Holmes v. Seely*, 19 Wend. (N. Y.) 507; *Tobey v. Webster*, 3 Johns. (N. Y.) 468.

⁴⁰ *Lankford v. Green*, 62 Ala. 314; *Witt v. St. Paul & N. P. Ry. Co.*, 38 Minn. 122, 35 N. W. 862; *Barstow v. Sprague*, 40 N. H. 27; *Todd v. Jackson*, 26 N. J. Law, 525; *Ehle v. Quackenboss*, 6 Hill (N. Y.) 537; *Frisbee v. Town of Marshall*, 122 N. C. 760, 30 S. E. 21; *Catteris v. Cowper*, 4 Taunt. 547.

⁴¹ Thus, if both parties can be considered in any sense as in possession, such mixed possession inures to the benefit of the one having the legal title. *Abbott v. Abbott*, 51 Me. 575, 579; *Leach v. Woods*, 14 Pick. (Mass.) 461. Cf. *Kentucky Land & Immigration Co. v. Crabtree*, 113 Ky. 922, 70 S. W. 31.

A mere licensee, having no interest in the premises, can bring no action for injury to the realty. *Powers v. Clarkson*, 17 Kan. 218; *Sabine & E. T. R. Co. v. Johnson*, 65 Tex. 389; *Hull v. Sanctuary*, 68 Vt. 57, 33 Atl. 899; nor can the holder of a contract to purchase, which gives no right to possession before payment, sue in trespass. *Greve v. Wood-Harmon Co.*, 173 Mass. 45, 52 N. E. 1070; *Des Jardins v. Thunder Bay River Boom Co.*, 95 Mich. 140, 54 N. W. 718; *Tabor v. Robinson*, 36 Barb. (N. Y.) 483. But he may sue in case. *Robb v. Mann*, 11 Pa. 300, 51 Am. Dec. 551.

A series of isolated trespasses will not operate as an ouster of the owner. *Welch v. Louis*, 31 Ill. 446; *Gent v. Lynch*, 23 Md. 58, 87 Am. Dec. 558, note; *Hughes v. Stevens*, 36 Pa. 320.

⁴² *Merwin v. Backer*, 80 Conn. 338, 68 Atl. 373; *New Windsor v. Stocksedale*, 95 Md. 196, 52 Atl. 596; *Nickerson v. Thacher*, 146 Mass. 609, 16 N. E. 581; *Cutts v. Spring*, 15 Mass. 135; *Fowler v. Owen*, 68 N. H. 270, 39 Atl. 329, 73 Am. St. Rep. 588; *Stahl v. Grover*, 80 Wis. 650, 50 N. W. 589.

⁴³ *Graham v. Peat*, 1 East. 244, 246, per Lord Kenyon, C. J.

stranger, and of waste or action in the nature of waste if done by the owner of a particular estate.⁴⁴

Where the trespass is to personalty, recovery may likewise be had in this form of action only by the one whose possession has been disturbed.⁴⁵ Possession may be actual.⁴⁶ It may likewise be constructive, for "it is established law that a person who has the general property in a personal chattel may maintain trespass for the taking of it by a stranger, although he never had the possession in fact; for a general property in a personal chattel draws to it a possession in law."⁴⁷ But, if plaintiff relies on constructive possession, it must appear that he has "such a right as to be entitled to reduce the goods to actual possession when he pleases."⁴⁸ Thus, while a bailor may maintain trespass, if at the time the wrong was committed he was in a position to terminate the bailment and resume immediate possession,⁴⁹ it is otherwise where he lacked this power,⁵⁰ though he may sue in case for an injury to his reversionary inter-

⁴⁴ *Cherry v. Lake Drummond Canal & Water Co.*, 140 N. C. 422, 424, 53 S. E. 138, 111 Am. St. Rep. 850, 6 Ann. Cas. 143. To the same effect, *Brown v. Bridges*, 31 Iowa, 138; *Hersey v. Chapin*, 162 Mass. 176, 38 N. E. 442; *Fitch v. Gosser*, 54 Mo. 267; *Devlin v. Sneltenburg*, 132 Pa. 186, 18 Atl. 1119. But see *Davis v. Nash*, 32 Me. 411; *Starr v. Jackson*, 11 Mass. 519; *Code Civ. Proc. N. Y.* § 1665; *Taylor v. Wright*, 51 App. Div. 97, 64 N. Y. Supp. 344.

⁴⁵ *Cook v. Thornton*, 109 Ala. 523, 20 South. 14; *Merrick v. Britton*, 26 Ark. 496; *Nachtrieb v. Stoner*, 1 Colo. 423; *Ginsberg v. Pohl*, 35 Md. 505; *Heath v. West*, 28 N. H. 101; *Wilson v. Haley Livestock Co.*, 153 U. S. 39, 14 Sup. Ct. 768, 38 L. Ed. 627.

⁴⁶ One may be in possession, though an agent or servant. *Craig v. Gilbreth*, 47 Me. 416; *Barker v. Miller*, 6 Johns. (N. Y.) 195; *Trovillo v. Tilford*, 6 Watts (Pa.) 468, 31 Am. Dec. 484; *Willis & Bro. v. Hudson*, 63 Tex. 678. See *Alabama G. S. R. Co. v. Jones*, 71 Ala. 487.

⁴⁷ *Bulkley v. Dolbeare*, 7 Conn. 232, 235, per Hosmer, C. J. To the same effect, *Cook v. Thornton*, 109 Ala. 523, 20 South. 14; *Truitt v. Warrington* (1912) 3 Boyce (Del.) 357, 84 Atl. 9; *Cannon v. Kinney*, 4 Ill. (3 Scam.) 9; *Ker v. Bryan*, 163 Fed. 233, 90 C. C. A. 179.

⁴⁸ *Putnam v. Wyley*, 8 Johns. (N. Y.) 432, 435, 5 Am. Dec. 346.

⁴⁹ *Jordan, Manning & Co. v. Wells*, 104 Ala. 383, 16 South. 23; *Freeman v. Rankins*, 21 Me. 446; *Orser v. Storms*, 9 Cow. (N. Y.) 687, 18 Am. Dec. 543; *Briggs v. Bennett*, 26 Vt. 146.

⁵⁰ *Boswell & Woolley v. Carlisle, Jones & Co.*, 70 Ala. 244; *Hume v. Tufts*, 6 Blackf. (Ind.) 136; *Muggridge v. Eveleth*, 9 Metc. (Mass.)

est.⁵¹ As in the case of realty, the wrongful disturber may be held liable to the one in actual possession,⁵² and it matters not that such possession was terminable at the will of the owner,⁵³ or that it was unlawful,⁵⁴ unless defendant shows that he, or the one under whom he acted, had the right to immediate possession.⁵⁵ "The peace and good order of society require that persons thus in possession of property, even without any title, should be enabled to protect such possession by appropriate remedies against mere naked wrongdoers."⁵⁶

TRESPASS AB INITIO

77 If one abuse a license given by law, he may be treated as a trespasser from the beginning.

In the celebrated case of the Six Carpenters,⁵⁷ decided in 1610, the defendants had entered an inn, where they were served with wine, for which they paid. Afterwards they

233; *Lunt v. Brown*, 13 Me. 236; *Putnam v. Wyley*, 8 Johns. (N. Y.) 432, 5 Am. Dec. 346; *Hurd v. Fleming*, 34 Vt. 169.

⁵¹ *Hall v. Snowhill*, 14 N. J. Law, 8; *White v. Griffin*, 49 N. C. 139. See *Nachtrieb v. Stoner*, 1 Colo. 423, 427; *Lexington & O. R. Co. v. Kidd*, 7 Dana (Ky.) 245.

⁵² *Gilson v. Wood*, 20 Ill. 37; *Outcalt v. Durling*, 25 N. J. Law, 443; *Kissam v. Roberts*, 6 Bosw. (N. Y.) 154; *Wooley v. Edison*, 35 Vt. 214; *Guttner v. Pacific Steam Whaling Co.* (D. C.) 96 Fed. 617.

⁵³ See *Barker v. Chase*, 24 Me. 230; *Laing v. Nelson*, 41 Minn. 521, 43 N. W. 476; *Matthews v. Smith's Express Co.*, 1 Misc. Rep. 238, 23 N. Y. Supp. 132; *Bass v. Pierce*, 16 Barb. (N. Y.) 595; *Taylor v. Hayes*, 63 Vt. 475, 21 Atl. 610. For right of finder to maintain trespass, see *Boston v. Neat*, 12 Mo. 125; *Hoyt v. Gelston*, 13 Johns. (N. Y.) 141, 151.

⁵⁴ *Barron v. Cobleigh*, 11 N. H. 557, 35 Am. Dec. 505; *Hoyt v. Van Alstyne*, 15 Barb. (N. Y.) 568; *Criner v. Pike*, 2 Head (Tenn.) 398; *Fisher v. Cobb*, 6 Vt. 622. See *Miller v. Kirby*, 74 Ill. 242; *Matthews v. Smith's Exp. Co.*, 1 Misc. Rep. 238, 23 N. Y. Supp. 132.

⁵⁵ *Searles v. Crombie*, 28 Ill. 396; *Cook v. Howard*, 13 Johns. (N. Y.) 276; *Costenbader v. Shuman*, 3 Watts & S. (Pa.) 504.

⁵⁶ *Stowell v. Otis*, 71 N. Y. 36, 38, per Earl, J.

⁵⁷ *SIX CARPENTERS' CASE*, 8 Coke, 146a, *Chapin Cas. Torts*, 182.

were supplied with more wine, for which they refused to pay. The innkeeper sued them as trespassers *ab initio*, and "it was resolved that when an entry, authority, or license is given to any one by the law, and he doth abuse it, he shall be a trespasser *ab initio*; but when an entry, authority or license is given by the party and he abuses it, there he must be punished for his abuse, but he shall not be a trespasser *ab initio*. And the reason of this difference is that, in the case of a general authority or license of law, the law adjudges by the subsequent act, *quo animo* or to what intent he entered. * * * But when the party gives an authority or license himself to do anything, he cannot for any subsequent cause punish that which is done by his own authority or license." * * * But "not doing cannot make the party who has authority or license by the law a trespasser *ab initio*, for not doing is no trespass."

The doctrine of this case, that one may be held as a trespasser from the very beginning if he abuses a license given by law, but not where the license is given by the party, has been repeatedly affirmed with respect both to real and personal property.⁵⁸ There is some difference of opinion, however, with respect to the last proposition, namely, that mere nonfeasance will not make the wrongdoer a trespasser *ab initio*.⁵⁹

⁵⁸ "The reason for the distinction, most commonly approved by modern text-writers and judicial decisions, is this: That an officer or other person acting by authority of law shall not be allowed to avail himself of it as an instrument of oppression, as the citizen is bound to submit to it without resistance, and has no opportunity to make provisions or stipulations for his own security, the exercise of the legal power is made conditional upon pursuing it wholly within legal limits. The abuse is held to be a forfeiture of the whole protection which the law gives to the act which it allowed." *Esty v. Willmot*, 81 Mass. (15 Gray) 168, 169, per Hoar, J. To the same ef-

⁵⁹ That nonfeasance is not enough, see *Waterbury v. Lockwood*, 4 Day (Conn.) 257, 4 Am. Dec. 215; *Taylor v. Jones*, 42 N. H. 25; *Hale v. Clark*, 19 Wend. (N. Y.) 498; *Fullam v. Stearns*, 30 Vt. 443. Cf. *Adams v. Rivers*, 11 Barb. (N. Y.) 390. But this has been questioned. See 14 Am. Dec. 366, note, and cases there cited, particularly *Sherman v. Braman*, 18 Metc. (Mass.) 407; *Brackett v. Vining*, 49 Me. 356; *Kerr v. Sharp*, 14 Serg. & R. (Pa.) 399.

REMEDIES

78. Damages may be obtained in an action at law, or chattels may be recovered in replevin. In certain cases, equity may relieve against trespasses to realty, and probably against trespasses to chattels.

Under what circumstances and to what extent force may be employed to defend or regain possession has already been considered.⁶⁰ Redress is usually sought in an action for damages, or, where the return of the goods is desired, in an action of replevin. In certain cases of trespass to realty, resort may also be had to equity, and an injunction obtained against the commission or continuance of the wrong. Originally this remedy was confined to waste,⁶¹ but it is now established that injunctive relief will be granted "when there is some vexation from continued trespasses, or some irreparable mischief which cannot easily be measured by damages, as the destruction of the inheritance, or of the property in the character in which it has been held and enjoyed, or where it is necessary to prevent a multi-

fect—real property, license given by law, *Walsh v. Brown*, 194 Mass. 317, 80 N. E. 465, 120 Am. St. Rep. 556; *Markham v. Brown*, 8 N. H. 523, 31 Am. Dec. 209; *Reed v. New York & R. Gas Co.*, 93 App. Div. 453, 87 N. Y. Supp. 810; *Kerr v. Sharp*, 14 Serg. & R. (Pa.) 399; *Crawford v. Maxwell*, 3 Humph. (Tenn.) 476; *Lawton v. Cardell*, 22 Vt. 524; real property, license given by party, *Page v. De Puy*, 40 Ill. 506; *Bennett v. McIntire*, 121 Ind. 231, 23 N. E. 78, 6 L. R. A. 736; *Beers v. McGinnis*, 191 Mass. 279, 77 N. E. 768; *Allen v. Crofoot*, 5 Wend. (N. Y.) 506; *Dumont v. Smith*, 4 Denio (N. Y.) 319; *Edelman v. Yeakel*, 27 Pa. 26; personal property, license given by law, *Sherman v. Braman*, 13 Metc. (Mass.) 407; *Gilson v. Flisk*, 8 N. H. 404; *Wyke v. Wilson*, 173 Pa. 12, 33 Atl. 701; *Lamb v. Day*, 8 Vt. 407, 30 Am. Dec. 479; cf. *Van Brunt v. Schenck*, 13 Johns. (N. Y.) 414; personal property, license given by party, *Bradley v. Davis*, 14 Me. 44, 30 Am. Dec. 729.

⁶⁰ See *supra*, pp. 262, 265.

⁶¹ See *Livingston v. Livingston*, 6 Johns. Ch. (N. Y.) 497, 3 Am. Dec. 353.

plicity of suits."⁵² It is to be noted, therefore, that in ordinary instances, where pecuniary compensation would be adequate, an injunction will not issue.⁵³ But, on the other hand, it has been held that an injunction will be granted where defendant threatens to destroy ornamental or fruit-bearing trees or shrubs,⁵⁴ or to interfere with the free and undisturbed enjoyment of the premises for religious worship,⁵⁵ or to cast a cloud on plaintiff's title by making surveys, defacing old and erecting new landmarks, with the purpose of procuring a patent to the land,⁵⁶ or where the result would be to disrupt the business of a common carrier, thereby causing great public inconvenience and loss.⁵⁷ So the fact that the trespasser is insolvent may be taken into consideration,⁵⁸ though it has been said that of itself it is not decisive.⁵⁹

There seems no reason why equity should not likewise interfere by injunction to prevent a contemplated injury to

⁵² *Waterman on Trespass*, vol. 2, p. 571. Cf. *Combs v. Rockingham County Com'rs*, 170 N. C. 87, 86 S. E. 963.

⁵³ *Stein v. Coleman*, 73 Conn. 524, 48 Atl. 206; *Wangelin v. Goe*, 50 Ill. 459; *Wabash R. Co. v. Engleman*, 160 Ind. 329, 66 N. E. 892; *Fisher v. Carpenter*, 67 N. H. 569, 39 Atl. 1018; *Boyden v. Bragaw*, 53 N. J. Eq. 26, 30 Atl. 330; *Troy & B. R. Co. v. Boston, H. T. & W. Ry. Co.*, 86 N. Y. 107; *O'Neill v. City of McKeesport*, 201 Pa. 386, 50 Atl. 920.

⁵⁴ *Smith v. Price*, 39 Ill. 28, 89 Am. Dec. 284; *Shipley v. Ritter*, 7 Md. 408, 61 Am. Dec. 371; *Sapp v. Roberts*, 18 Neb. 299, 25 N. W. 96; *Talnter v. Mayor of Morristown*, 19 N. J. Eq. 46; *Wilson v. City of Mineral Point*, 39 Wis. 160.

⁵⁵ *Trustees of German Evangelical Congregation of New Elm v. Hoessell*, 13 Wis. 348.

⁵⁶ *Preston v. Preston*, 85 Ky. 16, 2 S. W. 501.

⁵⁷ *Pennsylvania Co. v. Ohio River Junction R. Co.*, 204 Pa. 356, 54 Atl. 259. See, further, *More v. Massini*, 32 Cal. 590; *Lamprey v. Danz*, 86 Minn. 317, 90 N. W. 578.

⁵⁸ *Martin v. Davis*, 96 Iowa, 718, 65 N. W. 1001; *Lockwood v. Lunsford*, 56 Mo. 68; *Gause v. Perkins*, 56 N. C. 177, 69 Am. Dec. 728; *Wilson v. Hill*, 46 N. J. Eq. 367, 19 Atl. 1007. Contra—i. e., that "it is the nature of the injury and not the incapacity of the party to respond in damages which determines the right"—*Kellogg v. King*, 114 Cal. 378, 46 Pac. 166, 55 Am. St. Rep. 74.

⁵⁹ *Wangelin v. Goe*, 50 Ill. 459; *Morgan v. Palmer*, 48 N. H. 336. Cf. *Harms v. Jacobs*, 158 Ill. 505, 41 N. E. 1071.

or destruction,⁷⁰ or transfer⁷¹ of personal property, when the latter is of a special and peculiar nature, or where for other reasons money damages would constitute inadequate redress.

DEFENSES

79. Defendant may plead license, certain forms of self-redress, such as distress, and also protection to self and property.

Under what circumstances the law will protect one who assumes to act under its authority has already been considered,⁷² as has also the defense of "necessity"⁷³ and the right of recaption.⁷⁴

The defendant may likewise show that he acted under a license, which may be revocable or irrevocable, and express or implied. Generally it is deemed revocable,⁷⁵ e. g., the license which the purchaser of a theater ticket has to enter for the purpose of witnessing the performance;⁷⁶

⁷⁰ Cf. *Warren Mills v. New Orleans Seed Co.*, 65 Miss. 391, 4 South. 298, 7 Am. St. Rep. 671; *Reis v. Rohde*, 34 Hun (N. Y.) 161; *Duke of Somerset v. Cookson*, 3 P. Wms. 390.

⁷¹ *Poincy v. Burke*, 28 La. Ann. 673; *Martin v. Jewell*, 37 Md. 530; *Walker v. Hunt*, 2 W. Va. 491, 98 Am. Dec. 779. Cf. *Denny v. Denny*, 113 Ind. 22, 14 N. E. 593; *Seabrook v. Mostowitz*, 51 S. C. 433, 29 S. E. 202; *Watson v. Sutherland*, 5 Wall. 74, 18 L. Ed. 580; *Hower v. Weiss Malting & Elevator Co.*, 55 Fed. 356, 5 C. C. A. 129; *Lady Arundell v. Phipps*, 10 Ves. 139. But see *More v. Ord*, 15 Cal. 204; *Zanhizer v. Hefner*, 47 W. Va. 418, 35 S. E. 4. Thus injunctions have issued to restrain the unlawful sale or removal of slaves. *Sanders v. Sanders*, 20 Ark. 610; *Cooper v. Newell*, 36 Miss. 316; *Henderson v. Vaulx*, 10 Yerg. (Tenn.) 30; *Sims v. Harrison*, 4 Leigh (Va.) 346. Contra, *Young v. Young*, 9 B. Mon. (Ky.) 66; *Du Pre v. Williams*, 58 N. C. 96.

⁷² See p. 106; also "Public Officers," p. 138 et seq.

⁷³ See supra, p. 106.

⁷⁴ See supra, p. 265.

⁷⁵ *Baltimore & H. R. Co. v. Algire*, 63 Md. 819; *Ruggles v. Lesure*, 24 Pick. (Mass.) 187; *Marston v. Gale*, 24 N. H. 176; *Hetfield v. Central R. Co.*, 29 N. J. Law, 571; *Sherman Line Co. v. Village of Glens Falls*, 101 App. Div. 269, 91 N. Y. Supp. 994.

⁷⁶ *Burton v. Scherpf*, 1 Allen (Mass.) 133, 79 Am. Dec. 717; *Purcell v. Daly*, 19 Abb. N. C. (N. Y.) 801; *Horney v. Nixon*, 213 Pa. 20,

and, if so, it will be a good defense only if the acts were done while it was in force. A sale of the land by the licensor will operate as a revocation,⁷⁷ and so will his death.⁷⁸ But a license is irrevocable if coupled with an interest. "By this is meant, not the interest the licensee has in doing the act permitted, but a legal interest conveyed to him in connection with the license, and to the enjoyment of which the license is essential."⁷⁹ For instance, if goods are sold while upon the premises of the vendor, the license which the vendee has to enter and remove them, whether it be expressly⁸⁰ or impliedly given,⁸¹ may not afterwards be revoked.⁸²

With respect to implied licenses it may be said that every one tacitly gives permission to call for proper purposes, such as social or commercial intercourse,⁸³ e. g., to lodge a complaint against an employé,⁸⁴ or, the premises being

61 Atl. 1088, 1 L. R. A. (N. S.) 1184, 110 Am. St. Rep. 520, 5 Ann. Cas. 349. See *People ex rel. Burnham v. Flynn*, 189 N. Y. 180, 82 N. E. 169, 12 Ann. Cas. 420; *Buenzle v. Newport Amusement Ass'n*, 29 R. I. 23, 68 Atl. 721, 14 L. R. A. (N. S.) 1242; *Wood v. Lead-bitter*, 13 M. & W. 838, 14 L. J. Ex. 161.

⁷⁷ *Worthen v. Garno*, 182 Mass. 243, 65 N. E. 67; *Bunke v. New York Tel. Co.*, 110 App. Div. 241, 97 N. Y. Supp. 66, affirmed 188 N. Y. 600, 81 N. E. 1161.

⁷⁸ *Johnson v. Carter*, 16 Mass. 443; *Eckert v. Peters*, 55 N. J. Eq. 379, 36 Atl. 491.

⁷⁹ *Cooley on Torts* (3d Ed.) vol. II, p. 638.

⁸⁰ *Long v. Buchanan*, 27 Md. 502, 92 Am. Dec. 653; *Wood v. Manly*, 11 Ad. & El. 34. See *Miller v. State*, 39 Ind. 267.

⁸¹ *Rogers v. Cox*, 96 Ind. 157, 49 Am. Rep. 152; *Folsom v. Moore*, 19 Me. 252. See *Parker v. Barlow*, 93 Ga. 700, 21 S. E. 213; *Giles v. Simonds*, 15 Gray (Mass.) 441, 77 Am. Dec. 373.

⁸² For other illustrations of licenses coupled with an interest, see *White v. Elwell*, 48 Me. 360, 77 Am. Dec. 231; *Nettleton v. Sikes*, 8 Metc. (Mass.) 34; *Williamston & T. R. Co. v. Battle*, 66 N. C. 540; *Funk v. Haldeman*, 53 Pa. 229. Cf. *Ketchum v. Newman*, 116 N. Y. 422, 22 N. E. 1052.

⁸³ *Lehman, Durr & Co. v. Shackelford*, 50 Ala. 437; *Mackie v. Heywood & Morrill Rattan Co.*, 88 Ill. App. 119; *Riley v. Harris*, 177 Mass. 163, 58 N. E. 584. See *Martin v. Houghton*, 45 Barb. (N. Y.) 258; *Adams v. Freeman*, 12 Johns. (N. Y.) 408, 7 Am. Dec. 327.

⁸⁴ *Chicago City Ry. Co. v. Rosenberger*, 110 Ill. App. 406.

used as a post office, to deposit or receive mail.⁸⁵ Indeed, the owner or occupant of premises invites, rather than merely licenses, an entry for a purpose connected with the business in which he is engaged.⁸⁶ This does not, however, militate against the right which one not an innkeeper or common carrier has to control his private business and select those with whom he chooses to deal. He can therefore prevent whom he pleases from entering, and when a person has entered under the implied license he has a right to request such person to depart, and the latter may not thereafter remain.⁸⁷

Defendant may merely have exercised his right of self-redress, as in cases of distress. As defined by Blackstone,⁸⁸ it is "the taking a personal chattel out of the possession of the wrongdoer into the custody of the party injured to procure a satisfaction for the wrong committed." It was generally employed "for the purpose of enforcing the payment of rent, taxes, or other duties, as well as to exact compensation for such damages as result from the trespasses of cattle."⁸⁹ As a protection against trespass it was not

⁸⁵ *Sterling v. Warden*, 51 N. H. 217, 12 Am. Rep. 80.

⁸⁶ *Pauckner v. Wakem*, 231 Ill. 276, 83 N. E. 202, 14 L. R. A. (N. S.) 1118; *Foren v. Rodick*, 90 Me. 276, 38 Atl. 175; *Drennan v. Grady*, 167 Mass. 415, 45 N. E. 741; *Gilbert v. Nagle*, 118 Mass. 278; *Swinerton v. Le Boutillier*, 7 Misc. Rep. 639, 28 N. Y. Supp. 53, 58 N. Y. St. Rep. 345, affirmed 148 N. Y. 752, 43 N. E. 990; *Bloomer v. Sneltenburg*, 221 Pa. 25, 69 Atl. 1124, 21 L. R. A. (N. S.) 464. As to the difference between licensees and invited persons, see *infra*, pp. 508, 510.

⁸⁷ *Breitenbach v. Trowbridge*, 64 Mich. 393, 31 N. W. 402, 8 Am. St. Rep. 829; *Bogert v. Haight*, 20 Barb. (N. Y.) 251. Cf. *Adams v. Freeman*, 12 Johns. (N. Y.) 408, 7 Am. Dec. 327. Under certain circumstances he may, of course, subject himself to an action for breach of contract or for a violation of a Civil Rights Act. Cf. *Consol. Laws N. Y. c. 6, art. 4, §§ 40, 41*.

⁸⁸ *Comm. book III, p. 6*.

⁸⁹ *Bouvier, L. Dict.* See 2 *Pollock & Maitland, History of English Law*, p. 575 et seq. As to distress of cattle damage feasant, see *Mosher v. Jewett*, 63 Me. 84; *Rust v. Low*, 6 Mass. 90; *Cook v. Gregg*, 46 N. Y. 439; *Taylor v. Welbey*, 36 Wis. 42. The right "sprang from a felt necessity for a summary and direct remedy against the beasts committing damage, and also for some guard against possible incentives to do hurt to them or put them out of the way. The owner

restricted, however, to cattle, since it might apply equally to domestic fowl,⁹⁰ or indeed to any chattel⁹¹ "found incumbering⁹² or doing damage on the land, either to the land itself or to chattels on the land."⁹³ The property so seized was placed by the distrainer in pound there to be held in pledge for the payment of the damages.⁹⁴ The right of distress in some states has been regulated by statute.⁹⁵

Distinguished from distress, by the fact that the object is prevention, is the right which the landowner has to drive away trespassing cattle,⁹⁶ using no means or degree of force beyond what is reasonably necessary to accomplish the purpose.⁹⁷ He may, for instance, use a dog, unless there is something in the size, character, or habits of the dog, or in the mode of setting him on, or pursuing, which would negative the idea of ordinary care and prudence.⁹⁸

might not be discoverable, or be in a situation to be reached by process, or, if discovered and within the reach of process, there might be impediments to any redress by an ordinary action. And if the beasts could not be held, the injured party might be moved to misuse them, or put them in a way to be lost to the owner." *Hamlin v. Mack*, 33 Mich. 103, 106, per Graves, C. J.

⁹⁰ *McPherson v. James*, 69 Ill. App. 337. See *State v. Neal*, 120 N. C. 613, 619, 27 S. E. 81, 58 Am. St. Rep. 810.

⁹¹ *Ambergate, etc., R. Co. v. Midland R. Co.*, 2 E. & B. 793 (locomotive). Cf. Code Civ. Proc. N. Y. § 1724. Not applicable to dogs. *Fisher v. Badger*, 95 Mo. App. 289, 293, 69 S. W. 26 (semble).

⁹² *Ambergate, etc., R. Co. v. Midland R. Co.*, supra.

⁹³ *Pollock on Torts*, p. 383; *Roscoe v. Bodin*, 63 L. J. Q. B. 767, [1894] 1 Q. B. 608.

⁹⁴ See *Rockwell v. Nearing*, 35 N. Y. 302, 309.

⁹⁵ See Code Iowa, § 2313; *Syford v. Shriver*, 61 Iowa, 155, 16 N. W. 56; Rev. Laws Mass. (1902) c. 33, § 26; *Connors v. Loker*, 134 Mass. 510.

⁹⁶ *Bonney v. Smith*, 121 Mass. 155; *Cory v. Little*, 6 N. H. 213, 25 Am. Dec. 458; *Humphrey v. Douglass*, 10 Vt. 71, 33 Am. Dec. 177.

⁹⁷ *Snap v. People*, 19 Ill. 80, 68 Am. Dec. 582; *Leach v. Lynch*, 144 Mo. App. 391, 128 S. W. 795; *Carney v. Brome*, 77 Hun, 583, 28 N. Y. Supp. 1019. He must not drive them an unreasonable distance from his premises. *Knour v. Wagoner*, 16 Ind. 414; *Gilson v. Fisk*, 8 N. H. 404. See *Knott v. Digges*, 6 Har. & J. (Md.) 230.

⁹⁸ *Wood v. La Rue*, 9 Mich. 158, 160; *Tobin v. Deal*, 60 Wis. 87, 91, 18 N. W. 634, 50 Am. Rep. 345. To the same effect, see *Richard-*

So, with due care,⁹⁹ one may remove an inanimate chattel wrongfully upon his land,¹⁰⁰ and may enter upon the owner's land for the purpose of replacing it.¹⁰¹ Under certain conditions the animal or fowl may be killed, but not merely because it is trespassing.¹⁰² The defendant must establish that he had reasonable cause to believe and did believe that the killing was necessary for purposes of self-protection,¹⁰³ or the protection of property.¹⁰⁴

The effect of an offer to return the goods will be discussed later in connection with conversion.¹⁰⁵

son v. Carr, 1 Har. (Del.) 142, 25 Am. Dec. 65; Totten v. Cole, 33 Mo. 138, 82 Am. Dec. 157; Carney v. Brome, 77 Hun, 583, 28 N. Y. Supp. 1019; Davis v. Campbell, 23 Vt. 236. See Spray v. Ammerman, 66 Ill. 309.

⁹⁹ Grier v. Ward, 23 Ga. 145; Mead v. Pollock, 99 Ill. App. 151; Berry v. Carle, 3 Me. (3 Greenl.) 269; Behm v. Damm (Sup.) 91 N. Y. Supp. 735.

¹⁰⁰ Maryland Telephone & Telegraph Co. v. Ruth, 106 Md. 644, 68 Atl. 358, 14 L. R. A. (N. S.) 427, 124 Am. St. Rep. 506, 14 Ann. Cas. 576; Clark v. Kelliher, 107 Mass. 406; Crane v. Mason, Wright (Ohio) 333; Knapp v. Hortung, 103 Pa. 400. Cf. Burgess v. Graffam (C. C.) 18 Fed. 251.

¹⁰¹ Rea v. Sherward, 2 M. & W. 424.

¹⁰² Brent v. Kimball, 60 Ill. 211, 14 Am. Rep. 35; Clark v. Kelliher, 107 Mass. 406; Fenton v. Bisel, 80 Mo. App. 135; Matthews v. Tiestel, 2 E. D. Smith (N. Y.) 90; State v. Neal, 120 N. C. 613, 27 S. E. 81, 58 Am. St. Rep. 810.

¹⁰³ Russell v. Barrow, 7 Port. (Ala.) 106; Reynolds v. Phillips, 13 Ill. App. 557; Credit v. Brown, 10 Johns. (N. Y.) 365; Morris v. Nugent, 7 C. & P. 572.

¹⁰⁴ Ford v. Glennon, 74 Conn. 6, 49 Atl. 189; Harrington v. Hall, 6 Pennewill (Del.) 72, 63 Atl. 875; Livermore v. Batchelder, 141 Mass. 179, 5 N. E. 275; Aldrich v. Wright, 53 N. H. 398, 16 Am. Rep. 339; Leonard v. Wilkins, 9 Johns. (N. Y.) 233; Williams v. Dixon, 65 N. C. 416.

¹⁰⁵ See *infra*, p. 385.

DAMAGES

80. Upon the commission of a trespass, plaintiff is entitled at least to nominal damages, since there has been an invasion of a legal right. Beyond this, the amount depends upon circumstances.

Upon proof that a trespass has been committed, plaintiff becomes entitled to some damages, though where he has suffered no actual loss the amount may be but nominal.¹⁰⁶ Beyond this, except where smart money may be awarded,¹⁰⁷ his recovery will be limited to compensation for such damages as he may establish,¹⁰⁸ and which proximately result from the wrongful act.¹⁰⁹ The trespasser, it has been said, cannot be permitted to urge, even in mitigation, that he has really benefited the plaintiff by his wrongful acts, since one may not thrust benefits upon another, and then set them up in reduction of the damage he has caused.¹¹⁰ While generally this is true, it is unfair so to hold in cases where improvements have in good faith been added to the land, which plaintiff would not other-

¹⁰⁶ Realty, *Brown v. Perkins*, 1 Allen (Mass.) 89; *Brame v. Clark*, 148 N. C. 364, 62 S. E. 418, 19 L. R. A. (N. S.) 1033, 16 Ann. Cas. 73. Personalty, *Champion v. Vincent*, 20 Tex. 812.

¹⁰⁷ *Stevens v. Stevens*, 96 Ga. 374, 23 S. E. 312; *Druse v. Wheeler*, 22 Mich. 439; *Trainer v. Wolff*, 58 N. J. Law, 381, 33 Atl. 1051; *Brame v. Clark*, 148 N. C. 364, 62 S. E. 418, 19 L. R. A. (N. S.) 1033, 16 Ann. Cas. 73.

¹⁰⁸ *Engle v. Jones*, 51 Mo. 316. Proof of the extent of loss is essential, in order that there may be a recovery for more than nominal damages. *Batson v. Higginbotham*, 7 Ga. App. 835, 68 S. E. 455; *Caruth v. Allen*, 2 McCord (S. C.) 226; *Murray v. Pannaci*, 130 Fed. 529, 65 C. C. A. 153. Cf. *Fortescue v. Kings County Lighting Co.*, 128 App. Div. 826, 112 N. Y. Supp. 1010.

¹⁰⁹ Cf. *Burton v. Holley*, 29 Ala. 318, 65 Am. Dec. 401; *Loker v. Damon*, 17 Pick. (Mass.) 284; *Longfellow v. Quimby*, 29 Me. 196, 48 Am. Dec. 525; *Fore v. Western N. C. R. Co.*, 101 N. C. 526, 8 S. E. 335; *McKnight v. Ratcliff*, 44 Pa. 156.

¹¹⁰ *Bird v. Womack*, 69 Ala. 390; *Pinney v. Borough of Winsted*, 83 Conn. 411, 76 Atl. 994, 20 Ann. Cas. 923; *Williams v. Hathaway*, 21 R. I. 566, 45 Atl. 578. Cf. *Hanmer v. Wilsey*, 17 Wend. (N. Y.) 91.

wise have had, and which become his property, for here his damage is less by the value thus added.¹¹¹ But proof that the trespasser has not in fact benefited cannot be considered.¹¹²

It is manifestly impossible within the compass of this work to discuss adequately the principles governing the quantum of damages.¹¹³ Where there has been a permanent injury to real property, the damages are generally measured by the difference in values before and after the trespass.¹¹⁴ But it is permissible to prove the cost of restoring the property to its former condition, "for the very obvious reason that, if the land could be restored for less, the landowner ought to restore it, and not attempt to hold the tort-feasor for the full diminution in value."¹¹⁵ To

¹¹¹ *Jewett v. Whitney*, 43 Me. 242; *Mayo v. City of Springfield*, 138 Mass. 70; *Murphy v. City of Fond du Lac*, 23 Wis. 365, 99 Am. Dec. 181. Applied in trespass for mesne profits. *Morrison v. Robinson*, 31 Pa. 456. See *Putnam v. Ritchie*, 6 Paige Ch. (N. Y.) 390. Cf. Code Civ. Proc. N. Y. § 1531.

¹¹² Thus one who trespassed upon a mining claim is not entitled to a verdict merely because the value of the ore extracted equaled or was less than the cost of extracting it. *Empire Gold Min. Co. v. Bonanza Gold Min. Co.*, 67 Cal. 406, 7 Pac. 810.

¹¹³ For illustrative cases, see *Wrightsville & T. R. Co. v. Holmes*, 85 Ga. 668, 11 S. E. 658; *Huftalin v. Misner*, 70 Ill. 55; *Johnson v. Farwell*, 7 Me. (7 Greenl.) 370, 22 Am. Dec. 203; *Thiel v. Bull's Ferry Land Co.*, 58 N. J. Law, 212, 33 Atl. 281. Deprivation of use and loss of profits, *White v. Moseley*, 8 Pick. (Mass.) 356; *Luse v. Jones*, 39 N. J. Law, 707; *Schile v. Brokhahus*, 80 N. Y. 614; *Capel v. Lyons*, 3 Misc. Rep. 73, 22 N. Y. Supp. 378, 51 N. Y. St. Rep. 601; mental anguish, *Moyer v. Gordon*, 113 Ind. 282, 14 N. E. 476; *Meagher v. Driscoll*, 99 Mass. 281, 96 Am. Dec. 759; *Lesch v. Great Northern Ry. Co.*, 97 Minn. 503, 106 N. W. 955, 7 L. R. A. (N. S.) 93; *Bonelli v. Bowen*, 70 Miss. 142, 11 South. 791.

¹¹⁴ *Southern Ry. Co. v. Cleveland*, 169 Ala. 22, 53 South. 767; *Barnett v. St. Anthony Falls Water Power Co.*, 33 Minn. 265, 22 N. W. 535; *Argotsinger v. Vines*, 82 N. Y. 308; *Pederty v. Wisconsin Zinc Co.*, 148 Wis. 245, 134 N. W. 356. Cf. *Freeman v. Sayre*, 48 N. J. Law, 37, 2 Atl. 650; *Disbrow v. Westchester Hardwood Co.*, 164 N. Y. 415, 58 N. E. 519.

¹¹⁵ *Manda v. City of Orange*, 77 N. J. Law, 285, 286, 72 Atl. 42, per Swayze, J. To the same effect, *Graessle v. Carpenter*, 70 Iowa, 166, 30 N. W. 392; *Cavanagh v. Durgin*, 156 Mass. 466, 31 N. E. 643; *Walters v. Chamberlin*, 65 Mich. 333, 32 N. W. 440.

this may be added compensation for loss of use.¹¹⁶ "On the other hand, when the cost of restoring is more than such diminution, the latter is generally the true measure of damages."¹¹⁷ If defendant's acts do not work any permanent injury to plaintiff's property, the diminution in rental value is the standard.¹¹⁸ Varying rules have been adopted with respect to the cutting of trees. A distinction is usually recognized between those available for timber or fuel and fruit or ornamental trees. The former have a substantial value in themselves, which may serve as a basis for compensation. The value of the latter when severed is but slight; hence their loss is an injury to the realty itself. It would be unsafe, however, to attempt the statement of a general doctrine.¹¹⁹ Where minerals have been mined, their value is usually fixed as *in situ*.¹²⁰

If a chattel has been destroyed, or taken and retained, its market value at the time of the taking or destruction, with interest, is awarded.¹²¹ If the deprivation has been not total, but partial, as where the owner has regained¹²² or retained possession,¹²³ he is entitled to the value of the

¹¹⁶ *Graessle v. Carpenter*, *supra*; *Cavanagh v. Durgin*, *supra*.

¹¹⁷ *Hartshorn v. Chaddock*, 135 N. Y. 116, 31 N. E. 997, 17 L. R. A. 426, per O'Brien, J. To the same effect, *Nelson v. Village of West Duluth*, 55 Minn. 497, 57 N. W. 149; *Smith v. Kansas City*, 128 Mo. 23, 30 S. W. 314; *Seely v. Alden*, 61 Pa. 302, 100 Am. Dec. 642.

¹¹⁸ *Carli v. Union Depot, S. R. & T. Co.*, 32 Minn. 101, 20 N. W. 89; *Gillett v. Trustees of Village of Kinderhook*, 77 Hun, 604, 28 N. Y. Supp. 1044; *Honsee v. Hammond*, 39 Barb. (N. Y.) 89; *Irwin v. Nolde*, 176 Pa. 594, 35 Atl. 217, 35 L. R. A. 415; *Carl v. Sheboygan & F. Du L. R. Co.*, 46 Wis. 625, 1 N. W. 295. Cf. *Baltimore & O. R. Co. v. Boyd*, 67 Md. 32, 10 Atl. 315, 1 Am. St. Rep. 362; *Adams v. Durham & N. R. Co.*, 110 N. C. 325, 14 S. E. 857.

¹¹⁹ See *Sedgwick on Damages*, vol. 3, § 933, and 38 Cyc. p. 1130, where the cases are collected.

¹²⁰ See *Sedgwick on Damages*, vol. 3, § 935.

¹²¹ *Oviatt v. Pond*, 29 Conn. 479; *Schindel v. Schindel*, 12 Md. 108; *Gardner v. Field*, 1 Gray (Mass.) 151; *Adams v. Blodgett*, 47 N. H. 219, 90 Am. Dec. 569; *King v. Orser*, 4 Duer (N. Y.) 431; *Conard v. Pacific Ins. Co.*, 6 Pet. (U. S.) 262, 8 L. Ed. 392.

¹²² *Fields v. Williams*, 91 Ala. 502, 8 South. 808; *Smith v. Miller*, 145 Ill. App. 606; *Hart v. Blake*, 31 Mich. 278. Cf. *Hammond v. Sullivan*, 112 App. Div. 788, 99 N. Y. Supp. 472.

¹²³ *Streett v. Laumier*, 34 Mo. 469. See *Graves v. Baltimore & N.*

chattel's use while deprived thereof, with the necessary and reasonable expense of repairs, and an amount which will represent the difference, if any, between the value before the injury and after the repairs.¹²⁴

In many states, by statute, double or treble damages are given in certain cases of willful trespass.¹²⁵

Where an injury has been done to the property itself, there would seem no reason why the possessor of a chattel should not be permitted to recover full damages from a stranger. Trespass was maintainable only for an injury to the thing itself, not for an injury to a right.¹²⁶ It has been said that, if "the suit is brought by a bailee or special property man against the general owner, then the plaintiff can recover the value of his special property only; but if the writ is against a stranger, then he recovers the value of the property and interest according to the general rule, and holds the balance beyond his own interest in trust for the general owner."¹²⁷ The same rule would ap-

Y. R. Co., 76 N. J. Law, 362, 69 Atl. 971; *Stearns v. McGinty*, 55 Hun, 101, 8 N. Y. Supp. 216; *Johnson v. Parker*, 7 Misc. Rep. 685, 28 N. Y. Supp. 146, 58 N. Y. St. Rep. 332; *Baker v. Mims*, 14 Tex. Civ. App. 413, 37 S. W. 190.

¹²⁴ Necessary and reasonable expense incurred in regaining possession should be allowed. See *Fields v. Williams*, *supra*.

¹²⁵ Real property, forcible entry or detainer, see *Howell's Ann. St. Mich.* (2d Ed.) 1912, § 13319; *Rev. Codes Mont.* 1907, § 6869; *Code Civ. Proc. N. Y.* § 1669; *Fults v. Munro*, 202 N. Y. 34, 95 N. E. 23, 37 L. R. A. (N. S.) 600, *Ann. Cas.* 1912D, 870; cutting trees, see *Code Iowa*, § 4306; *Werner v. Flies*, 91 Iowa, 146, 59 N. W. 18; *Rev. Laws Mass.* 1902, c. 185, § 7; *Palmer v. Davidson*, 211 Mass. 556, 98 N. E. 623; *Howell's St. Mich.* (2d Ed.) 1912, § 13317; *Bockes v. A. McAfee & Son Co.*, 165 Mich. 7, 130 N. W. 313; *Rev. Codes Mont.* 1907, § 6867; 4 *Comp. St. N. J.* 1910, p. 5396, § 1, (\$8 per tree); *Lott v. Leventhal*, 80 N. J. Law, 216, 76 Atl. 328; *Code Civ. Proc. N. Y.* §§ 1667, 1668; *McCruden v. Rochester Ry. Co.*, 5 Misc. Rep. 59, 25 N. Y. Supp. 114, affirmed 151 N. Y. 623, 45 N. E. 1133. Personal property, see *Rev. St. Mo.* 1909, § 5455; *Herman v. Owen*, 42 Mo. App. 387.

¹²⁶ See "The Disseizin of Chattels," by Prof. James Barr Ames, 3 *Harv. L. Rev.* 23, 313, 337.

¹²⁷ *White v. Webb*, 15 Conn. 302, 305, per Hinman, J., quoted in *Becker v. Baillies*, 44 Conn. 167, 174. To the same effect, *Luse v. Jones*, 39 N. J. Law, 707; *Criner v. Pike*, 2 Head (Tenn.) 398; *Wooley v. Edson*, 35 Vt. 214. But see *Sterrett's Ex'r v. Kaster*, 37 Ala. 306;

pear applicable to real property,¹²⁸ but by many courts the quantum of his recovery has been fixed by the extent of his interest.¹²⁹ The principle that the owner of the title, out of possession, may sue in case and likewise obtain the amount of damages to his interest,¹³⁰ will not, however, be allowed to work a disadvantage to the defendant by forcing him to pay twice. The doctrine of full liability to the possessor must be subject to an exception permitting the trespasser to prove in mitigation facts showing that the owner himself had no cause of action,¹³¹ e. g., that he has received the property or its proceeds,¹³² the effect of which may be to reduce the possessor's damages to the value of his interest.

Gwaltney v. Scottish Carolina Timber & Land Co., 115 N. C. 579, 20 S. E. 465.

¹²⁸ See *Elvins v. Delaware & A. Telegraph & Telephone Co.*, 63 N. J. Law, 243, 43 Atl. 903, 76 Am. St. Rep. 217; *Perry v. Jefferies*, 61 S. C. 292, 39 S. E. 515; *Willey v. Laraway*, 64 Vt. 559, 25 Atl. 436. Cf. *Rogers v. Atlantic, Gulf & Pacific Co.*, 213 N. Y. 246, 107 N. E. 661, L. R. A. 1916A, 787.

¹²⁹ "In the case of a tenant, whether for life or for years, he may sue and recover for the injury to his possession and right of enjoyment, and the reversioner or remainderman may sue and recover for any injury sustained to the estate in reversion or remainder. And where there are several entitled in succession as tenants for life, in tail, or in fee, they can recover only damages commensurate to the injury done to their respective estates. * * * The damages therefore must be assessed with reference to the extent of the several interests affected." *Zimmerman v. Shreeve*, 59 Md. 357, 362, per Alvey, J. See *Frisbee v. Town of Marshall*, 122 N. C. 760, 30 S. E. 21; *Sedgwick on Damages* (9th Ed.) vol. 1, p. 109 et seq.; *Sutherland on Damages* (3d Ed.) vol. IV, p. 2960 et seq.

¹³⁰ *Chattels*, *Forbes v. Parker*, 16 Pick. (Mass.) 462; *Goulet v. Asseler*, 22 N. Y. 225. See *New York, L. E. & W. R. Co. v. New Jersey Elec. Ry. Co.*, 60 N. J. Law, 338, 38 Atl. 828. Real property, *Randall v. Cleaveland*, 6 Conn. 328; *Indianapolis, B. & W. Ry. Co. v. McLaughlin*, 77 Ill. 275; *Walden v. Conn*, 84 Ky. 312, 1 S. W. 537, 4 Am. St. Rep. 204; *Van Deusen v. Young*, 29 N. Y. 9 (trespass under statute); *Dutro v. Wilson*, 4 Ohio St. 101. Cf. *Cotes & Patchin v. City of Davenport*, 9 Iowa, 227.

¹³¹ *Anthony v. Gilbert*, 4 Blackf. (Ind.) 348.

¹³² *Sheldon v. Southern Express Co.*, 48 Ga. 625; *Squire v. Hollenback*, 9 Pick. (Mass.) 551, 20 Am. Dec. 506; *Huning v. Chavez*, 7 N. M. 128, 34 Pac. 44. See *Elvins v. Delaware & A. Telegraph & Telephone Co.*, 63 N. J. Law, 243, 43 Atl. 903, 76 Am. St. Rep. 217.

CHAPTER XII

INFRINGEMENT OF PRIVATE PROPERTY (CONTINUED)—CONVERSION

- 81. Definition.
- 82. Method of Accomplishment.
- 83. Quantum of Plaintiff's Interest.
- 84. Defenses.
- 85. Damages.

DEFINED

81. Conversion is committed where there has been an unlawful act of dominion exerted over the personal property of another in denial of his right.¹

The common-law remedy was an action of trover, in which the declaration averred that defendant had found² the goods and had converted them to his own use.³ It was extended, however, to cases where dominion had been exercised; the allegation of a finding being treated as not

¹ See *Southern Exp. Co. v. Sinclair*, 130 Ga. 372, 373, 60 S. E. 849; *LAVERTY v. SNETHEN*, 68 N. Y. 522, 524, 23 Am. Rep. 184, Chapin Cas. Torts, 191; *Budd v. Multnomah Ry. Co.*, 12 Or. 271, 274, 7 Pac. 99, 53 Am. Rep. 355.

² Whence the name.

³ The following form of declaration in trover, taken from "The Attorney's Practice in the Court of Common Pleas" (1746, 2d Ed.) vol. 1, p. 121, is found in *Wigmore's Cases on Torts*, p. 666: "Surrey to wit, J. T. late of etc. Brewer was attached to answer W. B. of a plea of trespass on the case; and whereupon said W. B. by L. R. his attorney complains, that whereas the said W. B. on the tenth day of December in the fourteenth year of his present majesty's reign at Kingston, in the County of Surrey, was possessed of the following goods and chattels, to wit (here insert the goods) to the value of one hundred pounds, as of his own proper goods and chattels; and being so thereof possessed the said W. B. casually lost the said goods and chattels out of his hands and possession; which said goods and chattels afterwards, to wit, on the said tenth day of December in the fourteenth year aforesaid at Kingston aforesaid in the county aforesaid, came by finding to the hands and possession

traversable. It was well described by Lord Mansfield ⁴ as in form "a fiction; in substance, a remedy to recover the value of personal chattels wrongfully converted by another to his own use. The form supposes the defendant may have come lawfully by the possession of the goods. This action lies and has been brought in many cases where in truth the defendant has got the possession lawfully. Where the defendant takes them wrongfully and by trespass, the plaintiff, if he thinks fit to bring this action, waives the trespass and admits the possession to have been lawfully gotten." ⁵

It should therefore be noted that, where there had been an appropriation of personal property, it was essential to an action of trespass that the taking be shown to have been unlawful, while in an action of trover its lawfulness was assumed. ⁶ Again, trespass, it has been seen, consists merely in the unlawful and forcible disturbance of another's possession. To constitute conversion, defendant must have acted in defiance, and not in recognition, of the other's right. This was well illustrated in the celebrated case of *Fouldes v. Willoughby*.⁷ Here plaintiff had embarked with two horses on defendant's ferry boat. Defendant refused transportation and put the horses back on shore, turning them loose on the road. Now, whatever may have been plaintiff's right to recover for trespass, it is evident that there was no conversion,

of the said J. T. Nevertheless the said J. T. knowing the said goods and chattels to be the goods and chattels of the said W. B. and to him of right to belong and appertain, yet contriving and fraudulently intending craftily and subtilly to deceive and defraud the said W. B. of the said goods and chattels, has not delivered the said goods and chattels to the said W. B. (although often required) but afterwards to wit, on the tenth day of January, in the fourteenth year aforesaid at Kingston aforesaid, in the county aforesaid converted the said goods and chattels to his own proper use, to the damage of the said W. B. of £200 and thereupon he brings suit," etc.

⁴ *Cooper v. Chitty*, 1 Burr. 20, 31.

⁵ See, also, *Barron v. Davis*, 4 N. H. 338, 345; *Burnham v. Pldcock*, 33 Misc. Rep. 65, 67, 66 N. Y. Supp. 806; affirmed 58 App. Div. 273, 68 N. Y. Supp. 1007; *Burroughs v. Bayne*, 5 H. & N. 296, 309.

⁶ *Bradley v. Davis*, 14 Me. 44, 30 Am. Dec. 729; *Stanley v. Gaylord*, 1 Cush. (Mass.) 536, 48 Am. Dec. 643.

⁷ 8 M. & W. 540.

for at no time was there a denial of his right. "Why did this defendant turn the horses out of his boat? Because he recognized them as the property of the plaintiff. He may have been a wrongdoer in putting them ashore; but how is that inconsistent with the general right which the plaintiff has to the use of the horses?"⁸

At common law, trover lay only for the conversion of tangible chattels. This qualification no longer exists, for it is generally admitted that every species of personal property may now become the subject of an action of trover,⁹ including shares of stock,¹⁰ and certificates thereof,¹¹ promissory notes,¹² drafts,¹³ checks,¹⁴ muniments of title,¹⁵ and other instruments;¹⁶ also money,¹⁷ provided it "is capable of

⁸ *Fouldes v. Willoughby*, 8 M. & W. 540, 549, per Alderson, B. In accord, *SHEA v. MILFORD*, 145 Mass. 525, 14 N. E. 769, Chapin Cas. Torts, 184; *Mattice v. Brinkman*, 74 Mich. 705, 42 N. W. 172; *Hammond v. Sullivan*, 112 App. Div. 788, 99 N. Y. Supp. 472; *Simmons v. Lillystone*, 8 Exch. 431.

⁹ See *State v. Omaha Nat. Bank*, 59 Neb. 483, 492, 81 N. W. 319.

¹⁰ *Payne v. Elliot*, 54 Cal. 339, 35 Am. Rep. 80; *Ayres v. French*, 41 Conn. 142; *Budd v. Multnomah Ry. Co.*, 12 Or. 271, 7 Pac. 99, 53 Am. Rep. 355. Cf. *Daggett v. Davis*, 53 Mich. 35, 18 N. W. 548, 51 Am. Rep. 91; *Miller v. Miles*, 58 App. Div. 103, 68 N. Y. Supp. 565, affirmed 171 N. Y. 675, 64 N. E. 1123.

¹¹ *Stewart v. Bright*, 6 Houst. (Del.) 344; *Daggett v. Davis*, 53 Mich. 35, 18 N. W. 548, 51 Am. Rep. 91; *Barry v. Calder*, 48 Hun, 449, 1 N. Y. Supp. 586, affirmed 111 N. Y. 684, 19 N. E. 285; *Connor v. Hillier*, 11 Rich. (S. C.) 193, 73 Am. Dec. 105.

¹² *Kingman v. Pierce*, 17 Mass. 247; *Rose v. Lewis*, 10 Mich. 483; *Decker v. Mathews*, 12 N. Y. 313; *Brickhouse v. Brickhouse*, 33 N. C. 404.

¹³ *Comparet v. Burr*, 5 Blackf. (Ind.) 419; *People v. Bank of North America*, 75 N. Y. 547; *Evans v. Kymer*, 1 B. & Ad. 528.

¹⁴ *Lovell v. Hammond Co.*, 66 Conn. 500, 34 Atl. 511; *Pawson v. Miller*, 66 App. Div. 12, 72 N. Y. Supp. 1011.

¹⁵ *Towle v. Lovet*, 6 Mass. 394; *Weiser v. Zeisinger*, 2 Yeates (Pa.) 537.

¹⁶ *Griswold v. Judd*, 1 Root (Conn.) 221 (public securities); *Merchants' & Planters' Nat. Bank v. Trustees of Masonic Hall*, 62 Ga.

¹⁷ *Cullen v. O'Hara*, 4 Mich. 132; *Grand Trunk Ry. Co. v. Edwards*, 56 Barb. (N. Y.) 408. See *Moody v. Keener*, 7 Port. (Ala.) 218; *Farrelly v. Hubbard*, 148 N. Y. 592, 43 N. E. 65; *Meyer v. Doherty*, 133 Wis. 398, 113 N. W. 671, 13 L. R. A. (N. S.) 247, 126 Am. St. Rep. 967.

being identified, as when delivered at one time, by one act and in one mass, or when the deposit is special, and the identical money is to be kept for the party making the deposit, or when wrongful possession of such property is obtained."¹⁸ Crops,¹⁹ timber,²⁰ ore,²¹ and earth and gravel,²² are likewise subject to conversion upon severance from the realty.²³

Like trespass, conversion requires a positive act, or, unlike trespass, a wrongful withholding. Thus it is not conversion if property intrusted to a bailee is lost through the latter's want of care, though he may be held for negligence. There is here only nonfeasance. Nor will demand and refusal after loss alter the case, for, the property not being in the bailee's possession, he cannot deliver it.²⁴ But trover

271 (municipal bonds); *Toplitz v. Bauer*, 161 N. Y. 325, 55 N. E. 1059 (life insurance policy); *Reading Finance & Securities Co. v. Harley*, 186 Fed. 673, 108 C. C. A. 529 (certificates of deposit for stock). But trover cannot be maintained against a holder in due course, if the instrument be negotiable. *Goodwin v. Roberts*, 1 App. Cas. 476, 45 L. J. Ex. 748, 35 L. T. Rep. N. S. 179, 24 Wkly. Rep. 987; *Gorgier v. Mievile*, 3 B. & C. 45, 4 D. & R. 641, 10 E. C. L. 30, 107 Eng. Repr. 651.

¹⁸ *Hazelton v. Locke*, 104 Me. 164, 167, 71 Atl. 661, 20 L. R. A. (N. S.) 35, 15 Ann. Cas. 1009, per Peabody, J., citing numerous cases. In accord, *Hunnicutt v. Higginbotham*, 138 Ala. 472, 35 South. 469, 100 Am. St. Rep. 45; *Kerwin v. Balhatchett*, 147 Ill. App. 561; *Larson v. Dawson*, 24 R. I. 317, 53 Atl. 93, 96 Am. St. Rep. 716. Cf. *Gordon v. Hostetter*, 37 N. Y. 99, holding that trover will lie for money, though not specifically earmarked; *Kelsey v. Bank of Mansfield*, 85 App. Div. 334, 83 N. Y. Supp. 281.

¹⁹ *Nelson v. Burt*, 15 Mass. 204; *Mueller v. Olson*, 90 Minn. 416, 97 N. W. 115; *Lelidy v. Carson*, 115 Mo. App. 1, 90 S. W. 754; *Black v. Eason*, 32 N. C. 308; *Donahue v. Shippee*, 15 R. I. 453, 8 Atl. 541.

²⁰ *Sampson v. Hammond*, 4 Cal. 184; *Clow v. Plummer*, 85 Mich. 550, 48 N. W. 795.

²¹ *Ivy Coal & Coke Co. v. Alabama Coal & Coke Co.*, 135 Ala. 579, 33 South. 547, 93 Am. St. Rep. 46; *Hartford Iron Mining Co. v. Cambria Mining Co.*, 93 Mich. 90, 53 N. W. 4, 32 Am. St. Rep. 488.

²² *Nashville, C. & St. L. Ry. v. Karthaus*, 150 Ala. 633, 43 South. 791; *Radway v. Duffy*, 79 App. Div. 116, 80 N. Y. Supp. 334.

²³ See *Riley v. Boston Water Power Co.*, 11 Cush. (Mass.) 11.

²⁴ *DAVIS & SON v. HURT*, 114 Ala. 146, 21 South. 468, Chapin Cas. Torts, 185; *Berman v. Kling*, 81 Conn. 403, 71 Atl. 507; *Wams-*

will lie where the loss is due to the act of the bailee, though he may have been guilty of no intentional wrong, as where there was misdelivery by mistake or under a forged order.²⁵

METHOD OF ACCOMPLISHMENT

82. With respect to its method of accomplishment, conversion, it has been said, "may be divided into four distinct classes: (1) By a wrongful taking; (2) by an illegal assumption of ownership; (3) by an illegal user or misuser; and (4) by a wrongful detention."²⁶

With respect to the first, it has been seen that trover did not originally lie for a taking, since the goods must have come into the defendant's possession lawfully. But later it was recognized that there might be an exercise of dominion arising out of a taking though unlawful, for which trover might be brought, provided the facts showed a denial of plaintiff's right. Under such circumstances the remedy was concurrent with trespass.²⁷ The principle that a manual taking or appropriation is not essential in trespass applies equally to conversion. Hence trover may be maintained against an officer who unlawfully levied or attached,

ley v. Atlas Steamship Co., 168 N. Y. 533, 61 N. E. 896, 85 Am. St. Rep. 699; Ross v. Johnson, 5 Burr. 2825.

²⁵ Gibbons v. Farwell, 63 Mich. 344, 29 N. W. 855, 6 Am. St. Rep. 301; Devereux v. Barclay, 2 B. & Ald. 702. See Bowlín v. Nye, 10 Cush. (Mass.) 416; Hawkins v. Hoffman, 6 Hill (N. Y.) 586, 41 Am. Dec. 767.

²⁶ Glaze v. McMillon, 7 Port. (Ala.) 279, 281. Quoted in Strauss v. Schwab, 104 Ala. 669, 672, 16 South. 692. See, also, Baltimore & O. R. Co. v. O'Donnell, 49 Ohio St. 489, 497, 32 N. E. 476, 21 L. R. A. 117, 34 Am. St. Rep. 579; Aschermann v. Philip Best Brewing Co., 45 Wis. 262, 266.

²⁷ See Basset v. Maynard, 1 Rolle Abr. 105 M. Pl. 5; Kinaston v. Moore, Cro. Car. 89; Norman v. Bell, 2 B. & Ad. 190; Moody v. Whitney, 34 Me. 563; Phillips v. Bowers, 7 Gray (Mass.) 21.

it being sufficient that he assumed such control over the goods by a possession, actual or constructive, as deprived the owner of his dominion over them for any purpose.²⁸ The owner's consent to the taking will not prevent the taker from being treated as a converter, where he obtained the consent by fraud or other unlawful means. The owner is in a position to declare the transaction void, and to insist that the taking itself was tortious.²⁹

This is somewhat similar to the case where the property has been purchased from a thief.³⁰ Though the purchaser has paid value and acted in the best of faith, he has none the less taken unlawfully, and according to the weight of authority by the act of taking possession he becomes a converter. No demand for a return is therefore necessary.³¹ But the position of a purchaser in good faith and for value from one who acquired possession fraudulently is very different from that of the purchaser from a thief. "The superior equity of a purchaser of property from one who has acquired a title defeasible at the election of the former owner and vendor, by reason of fraud, to that of such owner seeking to reclaim his property, is based upon the fact

²⁸ *Johnson v. Farr*, 60 N. H. 426. In accord, *Abercrombie v. Bradford*, 16 Ala. 560; *Stuart v. Phelps*, 39 Iowa, 14; *Kloos v. Gatz*, 97 Minn. 167, 105 N. W. 639; *Reynolds v. Shuler*, 5 Cow. (N. Y.) 323.

²⁹ *Farwell v. Hanchett*, 120 Ill. 573, 11 N. E. 875; *Thurston v. Blanchard*, 22 Pick. (Mass.) 18, 33 Am. Dec. 700; *Moody v. Drown*, 58 N. H. 45; *Warner v. Vallily*, 13 R. I. 483. Cf. *Baird v. Howard*, 51 Ohio St. 57, 36 N. E. 732, 22 L. R. A. 846, 46 Am. St. Rep. 550.

³⁰ Not including, of course, negotiable instruments transferred to a holder in due course.

³¹ *Galvin v. Bacon*, 11 Me. 28, 25 Am. Dec. 258; *Heckle v. Lurvey*, 101 Mass. 344, 3 Am. Rep. 366; *Stanley v. Gaylord*, 1 Cush. (Mass.) 536, 48 Am. Dec. 643; *Hyde v. Noble*, 13 N. H. 494, 38 Am. Dec. 508; *Bucklin v. Beals*, 38 Vt. 653; *Eldred v. Oconto Co.*, 33 Wis. 133. But in New York a cause of action for conversion will not arise until demand and refusal. It is said: "The rule is a reasonable and just one that an innocent purchaser of personal property from a wrongdoer shall first be informed of the defect in his title and have an opportunity to deliver the property to the true owner, before he shall be made liable as a tort-feasor for a wrongful conversion." *Gillet v. Roberts*, 57 N. Y. 28, 34.

that, acting upon the evidence of title which the owner has permitted the wrongdoer to assume and possess, he has been induced to part with value, and will be the loser because of the credit given to the apparent ownership, if he is compelled to surrender the property.”⁸² It would seem logical to hold that, when the fraudulent purchaser transfers the goods to one who receives them in good faith, but pays no value, e. g., an assignee for the benefit of creditors, the latter is deemed to have taken wrongfully.⁸³ But the courts are not in accord.⁸⁴ To the rule that until the vendor does some act to disaffirm the transaction the property vests in the fraudulent vendee, and hence an innocent transferee for value will take title, the mere fact that the contract may be afterwards rescinded not affecting its intermediate efficiency, an exception must be noted where the fraud consists in false personation. “No contract is in such case made with the party personated, and none is contemplated with the false impersonator; the title, therefore, remains in the vendor, and the transaction is wholly inoperative, even as to third persons.”⁸⁵

Though defendant may have received possession under circumstances not amounting to a conversion, yet he may be liable in trover, if he has, however innocently, exercised dominion in defiance of the rights of the true owner, as by

⁸² *Barnard v. Campbell*, 58 N. Y. 73, 76, 17 Am. Rep. 208, per Allen, J. See *Curme, Dunn & Co. v. Rauh*, 100 Ind. 247; *American-German Nat. Bank v. Gray & Dudley Hardware Co.*, 129 Ky. 105, 110 S. W. 393; *Hoffman v. Noble*, 6 Metc. (Mass.) 68, 39 Am. Dec. 711.

⁸³ *Farwell v. Hanchett*, 120 Ill. 573, 11 N. E. 875; *Bussing v. Rice*, 2 Cush. (Mass.) 48; *Farley v. Lincoln*, 51 N. H. 577, 12 Am. Rep. 182.

⁸⁴ Thus in New York it is held that, the original possession of the transferee from the fraudulent purchaser not being tortious, it is necessary to change its character by demand and refusal before an action of trover or replevin can be maintained. *Goodwin v. Wertheimer*, 99 N. Y. 149, 1 N. E. 404.

⁸⁵ *Neff v. Landis*, 110 Pa. 204, 207, 1 Atl. 177, per Clark, J. In accord, *Moody v. Blake*, 117 Mass. 23, 19 Am. Rep. 394; *Ashton v. Allen*, 70 N. J. Law, 117, 56 Atl. 165; *Hamet v. Letcher*, 37 Ohio St. 856, 41 Am. Rep. 519.

making a sale,³⁶ exchange,³⁷ lease,³⁸ pledge,³⁹ or gift.⁴⁰ Thus, where it is held, as in New York, that the mere purchase and receipt of property from a thief is not of itself sufficient, the purchaser, by disposing of the property, will incur an immediate responsibility, thus obviating the necessity of demand.⁴¹

The phrase "exercise of dominion" must not be understood as indicating that defendant should have acted under claim of superior title in himself. It is the denial of the true owner's right which is the essential feature of conversion. Hence it is no excuse that in good faith one acted as servant or agent of another, who was himself a wrongdoer, since by so doing he in fact denied the existence of any conflicting right in others.⁴² This is well illustrated in the case of auctioneers.⁴³ But a mere bailee is guilty of no conversion, if he receive property from one not rightfully entitled to possession, and return it in good faith and without notice of the rights of the true owner,⁴⁴ or as common carrier, or otherwise "acting as a mere conduit, deliver

³⁶ *Kyle v. Gray*, 11 Ala. 233; *Levi v. Booth*, 58 Md. 305, 42 Am. Rep. 332; *Dyckman v. Vallente*, 42 N. Y. 549.

³⁷ *Haas v. Damon*, 9 Iowa, 589.

³⁸ *Gilmore v. Newton*, 9 Allen (Mass.) 171, 85 Am. Dec. 749.

³⁹ *Stevens v. Eames*, 22 N. H. 568; *Thrall v. Lathrop*, 30 Vt. 307, 73 Am. Dec. 306. Cf. *State, to Use of Wolff, v. Berning*, 74 Mo. 87.

⁴⁰ *Johnston v. Whittemore*, 27 Mich. 463.

⁴¹ *Pease v. Smith*, 61 N. Y. 477.

⁴² *SWIM v. WILSON*, 90 Cal. 126, 27 Pac. 33, 13 L. R. A. 605, 25 Am. St. Rep. 110, *Chapin Cas. Torts*, 189; *Shearer v. Evans*, 89 Ind. 400; *Wing v. Milliken*, 91 Me. 387, 40 Atl. 138, 64 Am. St. Rep. 238; *Sprights v. Hawley*, 39 N. Y. 441, 7 Trans. App. 14, 100 Am. Dec. 452, affirming *Dudley v. Hawley*, 40 Barb. (N. Y.) 397; *Perkins v. Smith*, 1 Wils. 328; *Parker v. Godin*, 2 Str. 813.

⁴³ *Robinson v. Bird*, 158 Mass. 357, 33 N. E. 391, 35 Am. St. Rep. 495; *Kearney v. Clutton*, 101 Mich. 106, 59 N. W. 419, 45 Am. St. Rep. 394; *Mohr v. Langan*, 162 Mo. 474, 63 S. W. 409, 85 Am. St. Rep. 503; *Hoffman v. Carow*, 22 Wend. (N. Y.) 285. And see *supra*, p. 60.

⁴⁴ *Nelson v. Iverson*, 17 Ala. 216; *STEELE v. MARSICANO*, 102 Cal. 666, 36 Pac. 920, *Chapin Cas. Torts*, 195; *Hill v. Hayes*, 38 Conn. 532; *Leonard v. Tidd*, 3 Metc. (Mass.) 6; *Scofield v. Kreiser* (City Ct.) 3 N. Y. Supp. 803. Cf. *Frome v. Dennis*, 45 N. J. Law, 515.

it in pursuance of the bailment," if this likewise is done before notice.⁴⁵

In addition to the methods already mentioned, a conversion may be worked by destroying the property,⁴⁶ or by a wrongful user or misuser. Instances of the latter are frequently found where bailees have acted contrary to the terms of the bailment. Thus it is conversion if one, having hired a horse to go to one place, drive elsewhere,⁴⁷ or if, having received cattle for pasture, he work them.⁴⁸ Further illustrations will be found in the note.⁴⁹

It is sometimes difficult to draw the line between cases of mere breach of duty by an agent, who was authorized to do the act, but disobeyed instructions as to the method of performance, and cases where such agent had no authority to act at all. The result of the authorities is that if he parts with the property in accordance with his authority, although at a less price,⁵⁰ or if he misapplies the avails,⁵¹ or takes inadequate security,⁵² he is not liable for converting the property,⁵³ but only in an action on the case for misconduct. But it is otherwise if he parts with it in a way or for a purpose not authorized, as if, having been intrusted

⁴⁵ *Nanson v. Jacob*, 93 Mo. 331, 339, 6 S. W. 246, 3 Am. St. Rep. 531. In accord, *Gurley v. Armstead*, 148 Mass. 267, 19 N. E. 389, 2 L. R. A. 80, 12 Am. St. Rep. 555; *Greenway v. Fisher*, 1 C. & P. 190.

⁴⁶ *Olds v. Chicago Open Board of Trade*, 33 Ill. App. 445 (canceling board of trade certificate); *Simmons v. Sikes*, 24 N. O. 98; *Aschermann v. Philip Best Brewing Co.*, 45 Wis. 262.

⁴⁷ *Welch v. Mohr*, 93 Cal. 371, 28 Pac. 1060; *Hall v. Corcoran*, 107 Mass. 251, 9 Am. Rep. 30; *Fisher v. Kyle*, 27 Mich. 454; *Freeman v. Boland*, 14 R. I. 39, 51 Am. Rep. 340. But see *Doolittle v. Sherman & Shaw*, 92 Iowa, 348, 60 N. W. 621, 26 L. R. A. 366, 54 Am. St. Rep. 562.

⁴⁸ *Gove v. Watson*, 61 N. H. 136.

⁴⁹ *Jones v. Fort*, 36 Ala. 449; *Stewart v. Davis*, 31 Ark. 518, 25 Am. Rep. 576; *Hynes v. Patterson*, 95 N. Y. 1; *Buchanan v. Smith*, 10 Hun (N. Y.) 474; *Syeds v. Hay*, 4 Term R. 260; *Lord Pike v. Heneage*, 12 Mod. 519.

⁵⁰ *Sarjeant v. Blunt*, 16 Johns. (N. Y.) 74; *Dufresne v. Hutchinson*, 3 Taunt. 117.

⁵¹ *Palmer v. Jarmain*, 2 M. & W. 282.

⁵² See *Cairnes v. Bleecker*, 12 Johns. (N. Y.) 300.

⁵³ Cf. *Industrial & General Trust, Ltd., v. Tod*, 170 N. Y. 233, 63 N. E. 285.

with property for sale, agreeing to return it or the avails the next day, and under instructions not to part with it without the money, he deliver it to another who had promised to sell and return the proceeds,⁵⁴ or if, having received property for sale, he exchange it for other property,⁵⁵ or if, having been instructed to sell on a given date, he sell on a later date.⁵⁶

Now for conversion arising out of an unlawful detention. Here the defendant's possession was not illegal in its origin. He might have found the goods, or obtained them with the consent of the owner, as in cases of bailment. In the three classes already discussed, a demand and refusal is unnecessary, "as the evidence arising from the acts of the defendant is sufficient to prove the conversion. In the latter class alone is such evidence to be required, as the mere detention of a chattel furnishes no evidence of a disposition to convert it to the holder's use or to divest the owner of his property."⁵⁷ An unqualified refusal to return the property is evidence of a conversion. Usually it is sufficient,⁵⁸ but this is not invariably so, for the chattel may not then be in the defendant's possession or under his control, and though in such cases, if at fault, he may be held liable in the proper form of action, he cannot be considered a converter, because he has not done the impossible.⁵⁹ Furthermore, a re-

⁵⁴ *LAVERTY v. SNETHEN*, 68 N. Y. 522, 23 Am. Rep. 184, Chapin Cas. Torts, 191. Cf. *Neale v. Weare Bank*, 3 Allen (Mass.) 202.

⁵⁵ *Haas v. Damon*, 9 Iowa, 589.

⁵⁶ *Scott v. Rogers*, 31 N. Y. 676.

⁵⁷ *Glaze v. McMillion*, 7 Port. (Ala.) 279, 281, per Goldthwaite, J., quoted in *Strauss & Sons v. Schwab*, 104 Ala. 669, 672, 16 South. 692. That demand and refusal are necessary to change a lawful into an unlawful holding, there having been no act of dominion committed, see *Moore v. Monroe Refrigerator Co.*, 128 Ala. 621, 29 South. 447; *Songer v. Lynch*, 72 Ill. 498; *Temple Co. v. Penn Mutual Life Ins. Co.*, 69 N. J. Law, 36, 54 Atl. 295; *Williamson v. Seeley*, 22 App. Div. 389, 48 N. Y. Supp. 196; *Taylor v. Hanlon*, 103 Pa. 504.

⁵⁸ *Clark v. Hale*, 34 Conn. 398, *Huxley v. Hartzell*, 44 Mo. 370; *Wykoff v. Stevenson*, 46 N. J. Law, 326; *McCormick v. Pennsylvania Cent. R. Co.*, 49 N. Y. 303; *Id.*, 80 N. Y. 353; *Id.*, 99 N. Y. 65, 1 N. E. 99, 52 Am. Rep. 6.

⁵⁹ *STEELE v. MARSICANO*, 102 Cal. 666, 36 Pac. 920, Chapin Cas. Torts, 195; *Hagar v. Randall*, 62 Me. 439; *Carr v. Clough*, 26 N. H.

fusal "may be accompanied with such reasonable qualification as to furnish an excuse for retention, and then there is no conversion shown merely by proof of demand and refusal."⁶⁰ For instance, if the holder have a lien upon the goods, his refusal to surrender until payment will not subject him to a recovery in trover,⁶¹ and so where he merely requests the party making the demand to point out and identify the property,⁶² or to submit evidence of his authority to act for the owner,⁶³ or "when the refusal is only for a time, for the purpose of ascertaining ownership,"⁶⁴ as where demand has been made by one not known to be entitled to the goods, the party in possession declining compliance until he has had proper opportunity for investigation.⁶⁵ The refusal must have been in good faith,⁶⁶ the reply must not be evasive,⁶⁷ the qualification must be reasonable,⁶⁸ and, if investigation is desired, a decision must be reached within a reasonable time.⁶⁹ Again, one

280, 59 Am. Dec. 345; *Wood v. Fisk*, 215 N. Y. 233, 109 N. E. 177; *Salt Springs Nat. Bank v. Wheeler*, 48 N. Y. 492, 8 Am. Rep. 564.

⁶⁰ *McCormick v. Pennsylvania Cent. R. Co.*, 49 N. Y. 303, 310.

⁶¹ *Jeems v. Lewis*, 13 Ga. App. 456, 79 S. E. 235. Cf. *BOARDMAN v. SILL*, 1 Campb. 410, Chapin Cas. Torts, 194.

⁶² *Butler v. Jones*, 80 Ala. 436, 2 South. 300.

⁶³ *Ingalls v. Bulkley*, 15 Ill. 224; *Blankenship v. Berry*, 28 Tex. 449. Cf. *Alexander v. Southey*, 5 Barn. & Ald. 247; *Solomons v. Dawes*, 1 Esp. 83.

⁶⁴ *Buffington v. Clarke*, 15 R. I. 437, 438, 8 Atl. 247.

⁶⁵ *Zachary v. Pace*, 9 Ark. 212, 47 Am. Dec. 744; *Whiting v. Whiting*, 111 Me. 13, 87 Atl. 381; *Carroll v. Mix*, 51 Barb. (N. Y.) 212; *Green v. Dunn*, 2 Campb. 215. Cf. *Bolling v. Kirby & Bro.*, 90 Ala. 215, 7 South. 914, 24 Am. St. Rep. 789; *Singer Mfg. Co. v. King*, 14 R. I. 511.

⁶⁶ *Flannery v. Brewer*, 66 Mich. 509, 33 N. W. 522. Good faith usually a question for the jury. *McEntee v. New Jersey Steamboat Co.*, 45 N. Y. 34, 6 Am. Rep. 28; *Vaughan v. Watt*, 6 M. & W. 492.

⁶⁷ *Ingersoll v. Barnes*, 47 Mich. 104, 10 N. W. 127; *Dowd v. Wadsworth*, 13 N. C. 130, 18 Am. Dec. 567.

⁶⁸ Reasonableness of qualification usually a question for the jury. *Dent & Cade v. Chiles*, 5 Stew. & P. (Ala.) 383, 26 Am. Dec. 360; *Sutton v. Gt. Northern Ry. Co.*, 99 Minn. 376, 109 N. W. 815; *McEntee v. New Jersey Steamboat Co.*, 45 N. Y. 34, 6 Am. Rep. 28; *Alexander v. Southey*, 5 Barn. & Ald. 247.

⁶⁹ *Felcher v. McMillan*, 103 Mich. 494, 61 N. W. 791; *Sargent v.*

who is in a position to refuse qualifiedly must assign the proper ground. He may not refuse to give a reason for declining to return the property, nor may he give other than the true reason. The question of conversion or no conversion will be determined by his conduct at the time when demand was made.⁷⁰ If one is so embarrassed by conflicting claims that he feels unable safely to decide, he may relieve himself from responsibility by promptly commencing a suit in equity in the nature of a bill of interpleader,⁷¹ or by adopting whatever similar proceeding is recognized by the practice of his state.⁷²

QUANTUM OF PLAINTIFF'S INTEREST

83. To maintain trover, plaintiff must establish that at the time of the conversion he had possession, or a right to immediate possession.⁷³

Perhaps it would be more accurate to say the latter only, since to speak of possession itself as a requisite is to obscure the dividing line between trespass and trover; the former, as has been seen, being predicated on an injury to the thing, whereas the latter lies for an injury to the right. Hence trespass is brought by the possessor; trover by him who has the right to immediate possession. In cases where the plaintiff has possession in fact, he may, it is true, adopt

Gile, 8 N. H. 325; Ball v. Liney, 48 N. Y. 6, 8 Am. Rep. 511. Reasonableness of time is usually for the jury. Vaughan v. Watt, 6 M. & W. 492.

⁷⁰ Spence v. Mitchell, 9 Ala. 744; Ingalls v. Bulkley, 15 Ill. 224; Rogers v. Weir, 34 N. Y. 463; BOARDMAN v. SILL, 1 Campb. 410, Chapin Cas. Torts, 194.

⁷¹ Byers v. Sansom-Thayer Commission Co., 111 Ill. App. 575; Beebe v. Mead, 101 App. Div. 500, 92 N. Y. Supp. 51; Ball v. Liney, 48 N. Y. 6, 8 Am. Rep. 511.

⁷² Cf. Code Civ. Proc. N. Y. § 820. As to interpleader by bailee, see note, 33 L. R. A. (N. S.) 696.

⁷³ Burton v. Tannehill, 6 Blackf. (Ind.) 470; Raymond Syndicate v. Guttentag, 177 Mass. 562, 59 N. E. 446; Stevenson v. Fitzgerald, 47 Mich. 166, 10 N. W. 185; Clements v. Yturria, 81 N. Y. 285.

either form, since his presumptive right to possession cannot be destroyed, except by one who has a paramount right. This is shown in the celebrated case of the chimney sweep, who, having found a jewel, was permitted to recover in trover against one who had taken it for examination and refused to return it,⁷⁴ and by a long line of authorities⁷⁵ it is established that it is the right to immediate possession, and not the right of ownership, which is involved.⁷⁶ For example, the bailee⁷⁷ may sue, having at the time of the conversion the right to the custody of the chattel as against the converter, though but a special property therein.

A constructive possession based upon a legal title⁷⁸ will be sufficient. "When another person may happen to be actually possessed of such property without holding it adversely to the owner,⁷⁹ or without being entitled to hold it against his consent,⁸⁰ the general property draws to the

⁷⁴ *Armory v. Delamirie*, Str. 505.

⁷⁵ *Carpenter v. Lewis*, 6 Ala. 682; *Anderson v. Gouldberg*, 51 Minn. 294, 53 N. W. 636; *Duncan v. Spear*, 11 Wend. (N. Y.) 54; *Danielson v. Roberts*, 44 Or. 108, 74 Pac. 913, 65 L. R. A. 526, 102 Am. St. Rep. 627.

⁷⁶ Thus it is not enough merely to allege that plaintiff was and is the owner, since it is not equivalent to an averment of possession or the right to possession. *Citizens' Bank of St. Louis v. Tiger Tail Mill & Land Co.*, 152 Mo. 145, 53 S. W. 902.

⁷⁷ *Baker v. Troy Compress Co.*, 114 Ala. 415, 21 South. 496; *Bode v. Lee*, 102 Cal. 583, 36 Pac. 936; *Vining v. Baker*, 53 Me. 544; *Shaw v. Kaler*, 106 Mass. 448; *Bowen v. Fenner*, 40 Barb. (N. Y.) 383. The pledgee may maintain trover. *Way v. Davidson*, 12 Gray (Mass.) 465, 74 Am. Dec. 604; *Walcott v. Keith*, 22 N. H. 196. Likewise the mortgagee. *Canfield v. W. J. Gould & Co.*, 115 Mich. 461, 73 N. W. 550; *White v. Phelps*, 12 N. H. 382; *Smith v. Smalley*, 19 App. Div. 519, 46 N. Y. Supp. 277.

⁷⁸ *Clements v. Yturria*, 81 N. Y. 285.

⁷⁹ Thus the owner and constructive possessor of the land may maintain trover for things which in their natural state form part of the freehold, but which have been severed therefrom and converted into chattels. There can be no constructive possession, however, where another is in actual possession holding adversely. *Pearce v. Aldrich Mining Co.* (1913) 184 Ala. 610, 64 South. 321.

⁸⁰ Plaintiff must be in a position to take possession immediately, and not merely at some future time. *Clark v. Draper*, 19 N. H. 419. Cf. *Knight v. Sackett & Wilhelms Litho. Co.*, 141 N. Y. 404, 36 N. E.

owner the constructive possession."⁸¹ Thus, where the chattel has been bailed for a definite time, which has not expired, the bailor cannot sue in trover,⁸² but can "sustain only a special action on the case for consequential damage to his reversionary right,"⁸³ though it is otherwise where the bailment has ended,⁸⁴ as where it was at the will of the bailor,⁸⁵ or where the conduct of the bailee gave to the bailor the right to terminate the bailment,⁸⁶ as where he has done an act amounting to a conversion.⁸⁷

392. A statutory lien on crops in favor of the landlord, since it gives him no right to possession, is not sufficient. *Folmar & Sons v. Copeland & Brantley*, 57 Ala. 588; *Dekle v. Calhoun* (1910) 60 Fla. 53, 53 South. 14.

⁸¹ *Lexington & Ohio R. Co. v. Kidd*, 7 Dana (Ky.) 245, 247. In accord, *Thorp v. Burling*, 11 Johns. (N. Y.) 285; *Williams v. Belthany*, 2 Mill, Const. (S. C.) 415; *Seward v. Heflin*, 20 Vt. 144.

⁸² *Triscony v. Orr*, 49 Cal. 612; *Lexington & Ohio R. Co. v. Kidd*, 7 Dana (Ky.) 245; *Raymond Syndicate v. Guttentag*, 177 Mass. 562, 59 N. E. 446; *Andrews v. Shaw*, 15 N. C. 70; *Gordon v. Harper*, 7 T. R. 9.

⁸³ *Lexington & Ohio R. Co. v. Kidd*, 7 Dana (Ky.) 245, 248. In accord, *Williams v. Brassell*, 51 Ala. 397; *Forbes v. Parker*, 16 Pick. (Mass.) 462. See *New York, L. E. & W. R. Co. v. New Jersey Electric Ry. Co.*, 60 N. J. Law, 338, 38 Atl. 828.

⁸⁴ "A bailment may be determined by the mere efflux of time, as where the chattel is bailed for a stated period. * * * It may be determined by the accomplishment of the object for which the thing was bailed, as where the chattel is hired for a particular purpose, or is pledged until the loan is repaid. It may be dissolved by mutual agreement at any time. And either party, as has been said, where the bailment is not for any particular time, may terminate it at will. It may be terminated by the total or partial destruction of the subject-matter of the bailment, as where a chattel is lost or is destroyed. It may be also terminated where the bailee disposes of it contrary to the terms of the bailment. In his case the bailment was terminated at the time of the injury, for then it was no longer, under the evidence, fit and suitable for the use which the contract of bailment contemplated." *New York, L. E. & W. R. Co. v. New Jersey Electric Ry. Co.*, 60 N. J. Law, 338, 342, 38 Atl. 828, per Lippincott, J.

⁸⁵ *Morgan v. Ide*, 8 Cush. (Mass.) 420; *Drake v. Redington*, 9 N. H. 243. But see *Forbes v. Marsh*, 15 Conn. 384.

⁸⁶ *Hardy v. Reed*, 6 Cush. (Mass.) 252.

⁸⁷ *United Shoe Machinery Co. v. Holt*, 185 Mass. 97, 69 N. E. 1056; *Sanborn v. Colman*, 6 N. H. 14, 23 Am. Dec. 703; *Swift v. Moseley*, 10 Vt. 208, 33 Am. Dec. 197; *Farrant v. Thompson*, 5 Barn. & Ald.

DEFENSES

84. A return in good faith by a custodian to the bailor, or to one who is in fact entitled to the possession, is a sufficient defense. But the defendant may not plead *jus tertii* unless he connect himself therewith. By the American doctrine, an offer to return, if not accepted, cannot be pleaded in defense.

It has been said that if one who, having been intrusted with the custody of goods by a person having no property therein, return them to the latter, in good faith and without notice of the rights of the true owner, he does not thereby subject himself to an action of trover.⁸⁸ Necessarily the defendant, in an action based upon an alleged unlawful detainer or a delivery to a third party, establishes a sufficient excuse where he proves that he delivered the chattel to, or dealt with it pursuant to the directions of, one who was in fact the true owner, or, more properly, the person having the then right to possession.⁸⁹ If, under such circumstances, he sets up the title of another, he does so at his peril, for he then makes himself a party to the controversy.⁹⁰

Though the defendant may plead *jus tertii* as against one in possession, this is subject to the qualification that he must connect himself therewith, for otherwise it will constitute no defense to an action of trover.⁹¹ But one not in actual possession, i. e., having only an alleged right to immediate possession, may not recover, where a right to possession is shown to be in

826. Cf. *Moseley v. Wilkinson*, 24 Ala. 411. But see *Andrews v. Shaw*, 15 N. C. 70.

⁸⁸ See *supra*, p. 377.

⁸⁹ *Thompson v. Andrews*, 53 N. C. 125; *The Idaho*, 93 U. S. 575, 23 L. Ed. 978.

⁹⁰ See *Rogers v. Weir*, 34 N. Y. 463, 471.

⁹¹ *Mitchell v. Thomas*, 114 Ala. 459, 21 South. 991; *Stevens v. Gordon*, 87 Me. 564, 33 Atl. 27; *Brown v. Shaw*, 51 Minn. 266, 53 N. W. 633; *Wheeler v. Lawson*, 103 N. Y. 40, 8 N. E. 360; *Marcy v. Parker*, 78 Vt. 73, 62 Atl. 19.

another, though defendant's connection is not established.⁹² Where a cause of action for conversion is complete, it will be no defense that thereafter the chattel was lost or destroyed through no fault of the converter.⁹³

In England there is a practice of staying proceedings in certain cases upon bringing converted property into court.⁹⁴ In the United States this is not generally followed. The doctrine here prevailing has been stated to be that "in trover, when the conversion of the property is shown, the right of action of the owner is complete. No tender or offer to restore the property after conversion will defeat the action or mitigate the damages. If the injured person accept the property when tendered, this may be shown in mitigation of damages, but will not defeat the action entirely. Nor will a mere agreement without consideration to receive the property defeat the action or mitigate the damages, where the injured party thinks proper to disregard the agreement and bring his suit for the conversion."⁹⁵

⁹² *Morey v. Hoyt*, 65 Conn. 516, 33 Atl. 496; *Schryer v. Fenton*, 15 App. Div. 158, 44 N. Y. Supp. 203, appeal dismissed 162 N. Y. 444, 56 N. E. 997.

⁹³ *Mason v. O'Brien*, 42 Miss. 420; *Baltimore & O. R. Co. v. O'Donnell*, 49 Ohio St. 489, 32 N. E. 476, 21 L. R. A. 117, 34 Am. St. Rep. 579. Cf. *Craufurd's Adm'r v. Smith's Ex'r*, 93 Va. 623, 23 S. E. 235, 25 S. E. 657.

⁹⁴ See *Fisher v. Prince*, 3 Burr. 1363, where the rule was laid down by Lord Mansfield and Mr. Justice Wilmot: "That where trover is brought for a specific chattel of an ascertained quantity and quality, and unattended with any circumstances that can enhance the damages above the real value, but that its real and ascertained value must be the sole measure of the damages, there the specific thing demanded may be brought into court; * * * where there is an uncertainty either as to the quantity or quality of the thing demanded, or that there is any tort accompanying it that may enhance the damages above the real value of the thing, and there is no rule whereby to estimate the additional value, there it shall not be brought in." See, further, *Earle v. Holderness*, 4 Bing. 462; *Tucker v. Wright*, 3 Bing. 601; *Coombe v. Sansom*, 1 Dow. & Ryl. 201.

⁹⁵ *Norman v. Rogers*, 29 Ark. 365, 369, per English, C. J. In accord, *Munier v. Zachary*, 138 Iowa, 219, 114 N. W. 525, 18 L. R. A. (N. S.) 572, 16 Ann. Cas. 526; *CARPENTER v. MANHATTAN LIFE INS. CO.*, 22 Hun (N. Y.) 47, Chapin Cas. Torts, 200; *Waller v. Bowling*, 108 N. C. 289, 12 S. E. 990, 12 L. R. A. 261. Cf. *Wooley v.*

DAMAGES

85. Usually the measure of damages is the value of the property, fixed at the time of its conversion, with interest.⁹⁶

In trover, therefore, there is ordinarily no recovery for loss of use,⁹⁷ nor is a subsequent increase or decrease in value to be taken into consideration.⁹⁸ Value is fixed as at the place of conversion.⁹⁹

A difficult question arises when we have to deal with property of fluctuating value, particularly stock. In New York, where defendant has acted in good faith, the plaintiff is awarded the highest market price which the stock attains within a reasonable time after he has learned of the conversion, since he might and presumably did replace the stock himself with ordinary diligence.¹⁰⁰ This doctrine is of considerable practical importance, since probably there are more stock transactions in New York than in all other parts of the country. Its fairness has caused its adoption

Carter, 7 N. J. Law, 85, 11 Am. Dec. 520, note (trespass). In *Rutland & W. R. Co. v. Bank of Middlebury*, 32 Vt. 639, the English practice was followed.

⁹⁶ *Sylvester v. Craig*, 18 Colo. 44, 31 Pac. 387; *Morley v. Roach*, 116 Ill. App. 534; *Wing v. Milliken*, 91 Me. 387, 40 Atl. 138, 64 Am. St. Rep. 238; *Johnson v. Sumner*, 1 Metc. (Mass.) 172; *McIntyre v. Whitney*, 139 App. Div. 557, 124 N. Y. Supp. 234, affirmed 201 N. Y. 526, 94 N. E. 1096.

⁹⁷ *Texarkana Water Co. v. Kizer* (Tex. Civ. App. 1901) 63 S. W. 913; *Hofreiter v. Schwabland*, 72 Wash. 314, 130 Pac. 364.

⁹⁸ *Bates v. Stansell*, 19 Mich. 91; *Baldwin v. Harvey*, Anth. N. P. (N. Y.) 214. Cf. *Hendricks v. Evans*, 46 Mo. App. 313.

⁹⁹ *Gensburg v. Marshall Field & Co.*, 104 Iowa, 599, 74 N. W. 3. Cf. *Hill v. Canfield*, 56 Pa. 454.

¹⁰⁰ *Wright v. Bank of the Metropolis*, 110 N. Y. 237, 18 N. E. 79, 1 L. R. A. 289, 6 Am. St. Rep. 356. Cf. *Griggs v. Day*, 158 N. Y. 1, 52 N. E. 692; *Mullen v. Quinlan & Co.*, 195 N. Y. 109, 87 N. E. 1078, 24 L. R. A. (N. S.) 511; *Keller v. Halsey*, 130 App. Div. 598, 115 N. Y. Supp. 564.

elsewhere,¹⁰¹ but some courts have awarded the highest value between conversion and trial,¹⁰² and others have fixed value, as in the case of an ordinary chattel, at the time and place of conversion.¹⁰³ It is evident, however, that the rule announced in *Wright v. Bank of the Metropolis*¹⁰⁴ by which indemnity is in effect allowed for speculative profits cannot be inflexibly applied. For instance, suppose the bailee has sold stock, thereby working a conversion. Thereafter the stock declines. The owner should here be permitted to recover value as of the time of conversion. It would be manifestly unfair to permit defendant to speculate upon replacing the stock at a lower price.¹⁰⁵

Where the action is brought by one who has possession, but not ownership, the same rule applies as in trespass, namely, that as against a stranger he will recover full value, being answerable for the surplus beyond his own interest, to the owner;¹⁰⁶ but if the converter is the holder of the legal title, or one claiming under him, plaintiff recovers merely the value of his interest or special property.¹⁰⁷ If the action is by the bailor against a bailee, who, as in the case of a pledgee or mortgagee, has a lien upon the proper-

¹⁰¹ *Citizens' St. R. Co. v. Robbins*, 144 Ind. 671, 42 N. E. 916, 43 N. E. 649; *Galigher v. Jones*, 129 U. S. 193, 9 Sup. Ct. 335, 32 L. Ed. 658. Cf. *Dimock v. United States Nat. Bank*, 55 N. J. Law, 296, 25 Atl. 926, 39 Am. St. Rep. 643.

¹⁰² *Sproul v. Sloan*, 241 Pa. 284, 88 Atl. 501, Ann. Cas. 1915B, 941. This was formerly the rule in New York. *Markham v. Jaudon*, 41 N. Y. 235.

¹⁰³ *Layman v. F. F. Slocomb & Co., Inc.* (Del. 1909) 7 Pennewill, 403, 76 Atl. 1094; *Sargent v. Franklin Ins. Co.*, 8 Pick. (Mass.) 90, 19 Am. Dec. 306. Cf. *Hagar v. Norton*, 188 Mass. 47, 73 N. E. 1073; *Torp v. Clemons* (1914) 37 Nev. 474, 142 Pac. 1115.

¹⁰⁴ 110 N. Y. 237, 18 N. E. 79, 1 L. R. A. 289, 6 Am. St. Rep. 356.

¹⁰⁵ *McIntyre v. Whitney*, 139 App. Div. 557, 124 N. Y. Supp. 234, affirmed 201 N. Y. 526, 94 N. E. 1096.

¹⁰⁶ *White v. Webb*, 15 Conn. 302; *Carson v. Hanawalt* (1912) 50 Ind. App. 409, 98 N. E. 448; *Ullman v. Barnard*, 7 Gray (Mass.) 554; *Einstein v. Dunn*, 61 App. Div. 195, 70 N. Y. Supp. 520, affirmed 171 N. Y. 648, 63 N. E. 1116; *Guttner v. Pacific Steam Whaling Co.* (D. C.) 96 Fed. 617.

¹⁰⁷ *White v. Allen*, 133 Mass. 423; *Harvey v. Morse*, 69 N. H. 475, 45 Atl. 239; *Frost v. Willard*, 9 Barb. (N. Y.) 440.

ty, the defendant is entitled to deduct the amount of his lien.¹⁰⁸

Where plaintiff has accepted a return of the chattel his damages have been measured by the difference in values at the time of conversion and the time of the return,¹⁰⁹ interest being computed upon both amounts to the trial.¹¹⁰

¹⁰⁸ *Briggs v. Boston & Lowell R. Co.*, 6 Allen (Mass.) 246, 83 Am. Dec. 626; *Baker v. Drake*, 66 N. Y. 518, 23 Am. Rep. 80; *Wheeler v. Pereles*, 43 Wis. 332.

¹⁰⁹ *Lucas v. Trumbull*, 15 Gray (Mass.) 306; *Green v. Stephens*, 37 Mo. App. 641; *Gove v. Watson*, 61 N. H. 136.

¹¹⁰ *Flagler v. Hearst*, 91 App. Div. 12, 86 N. Y. Supp. 808; *Eldridge v. Hoefer*, 45 Or. 239, 77 Pac. 874.

CHAPTER XIII

INFRINGEMENT OF PRIVATE PROPERTY (CONTINUED)—WASTE

86. Definition.

DEFINED

86. Waste is an unlawful act or omission by the possessor of a particular estate in real property which tends to destroy or lessen the value of the inheritance.¹

This tort may be committed only with respect to real property, and differs from trespass, in that the wrongdoer is rightfully in possession as holder of an interest less than a fee, whereas the trespasser has no right to immediate possession being usually an absolute stranger to the title. Waste is an injury to the reversion or remainder; trespass, to the possession.² Waste is voluntary or permissive. The former is positive, and consists in destructive acts.³ The

¹ For definitions of waste, see *Crowe v. Wilson*, 65 Md. 479, 5 Atl. 427, 57 Am. Rep. 343; *Delano v. Smith*, 206 Mass. 365, 370, 92 N. E. 500, 30 L. R. A. (N. S.) 474; *Whitney v. Huntington*, 34 Minn. 458, 462, 26 N. W. 631, 57 Am. Rep. 68; *Mudge v. West End Brewing Co.*, 68 Misc. Rep. 362, 368, 125 N. Y. Supp. 15; *Bandlow v. Thieme*, 53 Wis. 57, 60, 9 N. W. 920.

² See *Brigham v. Overstreet*, 128 Ga. 447, 57 S. E. 484, 10 L. R. A. (N. S.) 452, 11 Ann. Cas. 75; *Elwell v. Burnside*, 44 Barb. (N. Y.) 447; *Lander v. Hall*, 69 Wis. 326, 34 N. W. 80.

³ *Smith v. City Council of Rome*, 19 Ga. 89, 63 Am. Dec. 298 (removing rock); *Smith v. Mattingly*, 96 Ky. 228, 28 S. W. 503 (removing fence); *Chalmers v. Smith*, 152 Mass. 561, 26 N. E. 95, 11 L. R. A. 769 (damaging building by storing excessive weight); *Stevens v. Rose*, 69 Mich. 259, 37 N. W. 205 (cutting down ornamental trees); *Cannon v. Barry*, 59 Miss. 289 (removing machinery and partially dismantling building); *Childs v. Kansas City, St. J. & C. B. R. Co.*, 117 Mo. 414, 23 S. W. 373 (removing and selling rock); *Perry v. Carr*, 44 N. H. 118 (removing and selling manure made on the farm); *Regan v. Luthy*, 16 Daly, 413, 11 N. Y. Supp. 709 (removing fixtures); *U. S. v. Bostwick*, 94 U. S. 53, 24 L. Ed. 65 (destroying ornamental trees, tearing down fences and walls, removing

latter is negative—an omission to prevent injury, for instance, to suffer a building to fall into decay for want of repairs.⁴ It “implies negligence, which may consist either of acquiescence in or assent to the acts of strangers, or failure to prevent such acts, or to do that which is incumbent upon the party in possession as matter of good husbandry.”⁵

Whether the tenant’s act constitutes waste must be determined largely by the circumstances of the particular case. Usually it is for the jury to decide.⁶ For example, “in England the destruction of timber carries with it the idea of a permanent injury to the estate, as timber is scarce, and forest trees are planted for useful as well as ornamental purposes, and are too valuable to permit the timber to be unnecessarily destroyed.”⁷ But conditions in the United States have led our courts to adopt a more liberal doctrine. That which would in England have been very injurious to the estate might here in many cases be extremely beneficial. It has been said, therefore, that “regard must be had to the condition of the premises, and the inquiry should be: Did good husbandry, considered with reference to the custom of the country, require the felling of the trees, and were the acts such as a judicious and prudent owner of the inheritance would have committed?”⁸

stone and gravel). Tearing down a barn so dilapidated as to be dangerous is not waste, unless its condition resulted from the tenant’s neglect to repair. *Clemence v. Steere*, 1 R. I. 272, 53 Am. Dec. 621.

⁴ *Cannon v. Barry*, 59 Miss. 289; *Woodhouse v. Walker*, L. R. 5 Q. B. D. 404.

⁵ *Beekman v. Van Dolsen*, 63 Hun, 487, 490, 18 N. Y. Supp. 376, per Patterson, J.

⁶ *Eysaman v. Small*, 61 Hun, 618, 15 N. Y. Supp. 288.

⁷ *PROFFITT v. HENDERSON*, 29 Mo. 325, 327, Chapin Cas. Torts, 202, per Ewing, J. In accord, *Honywood v. Honywood*, 30 L. T. N. S. 671, L. R. 18 Eq. 306, 43 L. J. Ch. 652; *Pardoe v. Pardoe*, 82 L. T. N. S. 547.

⁸ *Woodward v. Gates*, 38 Ga. 205, 213, per Brown, C. J. In accord, *Drown v. Smith*, 52 Me. 141; *Cannon v. Barry*, 59 Miss. 289; *Morehouse v. Cotheal*, 22 N. J. Law, 521; *Jackson v. Brownson*, 7 Johns. (N. Y.) 227, 5 Am. Dec. 258; *Wilkinson v. Wilkinson*, 59 Wis. 557, 18 N. W. 527.

The same difference of opinion exists as to other alterations made by a tenant.⁹

With respect to permissive waste, it may be said generally that, in the absence of a covenant extending his liability, a lessee is "not bound to make substantial, lasting, or general repairs, but only such ordinary repairs as were necessary to prevent waste and decay of the premises."¹⁰ Sometimes the tenant holds "without impeachment for waste." When this or an equivalent expression¹¹ is used in the instrument creating his tenancy, he may "do many things, such as cutting wood, opening new mines, etc., which would otherwise at the common law amount to waste; but these words do not operate as a license to the tenant to destroy the estate, or to commit malicious waste, such as cutting down fruit-bearing trees, or trees which serve for shade or ornament."¹² If he exercises his pow-

⁹ E. g., changing level of the soil. *Pyncheon v. Stearns*, 11 Metc. (Mass.) 304, 45 Am. Dec. 207; *West Ham Central Charity Board v. Company of Proprietors, etc.*, 82 L. T. Rep. N. S. 85. Cf. *Clemence v. Steere*, 1 R. I. 272, 53 Am. Dec. 621; *Keepers and Governors, etc., of Harrow School v. Alderton*, 2 Bos. & P. 86, 126 Eng. Repr. 1170; *Simmons v. Norton*, 7 Bing. 640, 131 Eng. Repr. 247.

¹⁰ *Suydam v. Jackson*, 54 N. Y. 450, 454 (action for rent), per Earl, C., who added: "If a window in a building should blow in, the tenant could not permit it to remain out, and the storm to beat in and greatly injure the premises, without liability for permissive waste; and if a shingle or board on the roof should blow off, or become out of repair, the tenant could not permit the water, in time of rain, to flood the premises, and thus injure them, without a similar liability. He being present, a slight effort and expense on his part could save a great loss; and hence the law justly casts the burden upon him." He is only required to keep the house "wind and water tight." *Auworth v. Johnson*, 5 C. & P. 545.

¹¹ *Chapman v. W. F. Epperson Circled Heading Co.*, 101 Ill. App. 161 ("without liability for the commission of waste"); *Stevens v. Rose*, 69 Mich. 259, 37 N. W. 305 ("to have and to hold, to use and control as he thinks proper, for his benefit during his natural life"); *Wiley v. Wiley* (1901) 1 Neb. Unof. 350, 95 N. W. 702 ("the use and full control"). Cf. *Agate v. Lowenbein*, 57 N. Y. 604.

¹² *Stevens v. Rose*, 69 Mich. 259, 269, 37 N. W. 205. Cf. *Chapman v. W. F. Epperson Circled Heading Co.*, 101 Ill. App. 161.

er in an unconscientious manner, a court of equity may interfere to restrain him.¹³

"At common law, waste lay against a tenant in dower, tenant by the curtesy, and guardian in chivalry, but not against lessees for life or years. The reason of this diversity was that the estates and interests of the former were created by the law, and therefore the law gave a remedy against them, but the latter came in by the act of the owner, who might have provided in his demise against the doing of waste by his lessee, and, if he did not, it was his negligence and default."¹⁴ But tenants for life or years were made liable by the Statutes of Marlbridge¹⁵ and Gloucester,¹⁶ both, it would seem, for voluntary and permissive waste.¹⁷ A tenant at will, however, was not within these statutes, and although he might be liable to his landlord in an action of trespass, if the waste were voluntary,¹⁸ no action would lie if it were merely permissive.¹⁹

The action of waste was originally a mixed action. The

¹³ *Belt v. Simkins*, 113 Ga. 894, 39 S. E. 430; *Duncombe v. Felt*, 81 Mich. 332, 45 N. W. 1004; *Vane v. Lord Barnard*, 2 Vern. 738. Cf. *Clement v. Wheeler*, 25 N. H. 361; *Agate v. Lowenbein*, 57 N. Y. 604; *Baker v. Sebright*, 41 L. T. Rep. N. S. 614.

¹⁴ *Townshend v. Moore*, 33 N. J. Law, 284, 300, per Depue, J., citing 2 Inst. 299, and Co. Litt. 54.

¹⁵ 52 Hen. III, c. 23.

¹⁶ 6 Edw. I, c. 5.

¹⁷ See *Sampson v. Grogan*, 21 R. I. 174, 178, 42 Atl. 712, 44 L. R. A. 711; *Lothrop v. Thayer*, 138 Mass. 466, 472, 52 Am. Rep. 286; *Townshend v. Moore*, 33 N. J. Law, 284; *Parrott v. Barney*, 18 Fed. Cas. p. 1236, No. 10773A; *Harnett v. Maitland*, 16 M. & W. 257. Also tenants from year to year. *Newbold v. Brown*, 44 N. J. Law, 266.

¹⁸ *Perry v. Carr*, 44 N. H. 118.

¹⁹ *Lothrop v. Thayer*, 138 Mass. 466, 52 Am. Rep. 286; *Coale v. Hannibal & St. J. R. Co.*, 60 Mo. 227; *Harnett v. Maitland*, 16 M. & W. 257; *Countess of Shrewsbury's Case*, 5 Coke, 13 b. "The reason of this exemption of tenants at will from liability for permissive waste was the uncertain nature of their tenure, which would make it a hardship to compel them to go to any expense for repairs. Their exemption from the highly remedial process of waste provided by the statute of Gloucester is attributable to the fact that the owner of the inheritance might at any time, by entry, determine the estate of the tenant, and thus protect the inheritance from spoil or destruction." *Townshend v. Moore*, 33 N. J. Law, 284, 301, per Depue, J.

plaintiff recovered, not only the premises injured, but also the damages sustained. Having fallen into disrepute, it was finally abolished in England by St. 3 & 4 William IV, c. 27. "In this country, although adopted in some of the states, it has been but little used, having been in practice virtually superseded by the action on the case in the nature of waste for the recovery of damages merely, or by bill in equity."²⁰ The subject has been regulated to a considerable extent by statute.²¹

²⁰ *Stevens v. Rose*, 69 Mich. 259, 269, 37 N. W. 205, per Long, J.

²¹ As in Indiana (Burns' Ann. St. 1914, §§ 288, 289), Michigan (Howell's Ann. St. [2d Ed.] 1912, §§ 13300-13316), New Jersey (4 Comp. St. 1910, pp. 5789-5791, §§ 1-8), and New York (Code Civ. Proc. §§ 1651-1659).

CHAPTER XIV

INFRINGEMENT OF PRIVATE PROPERTY (CONTINUED)—
FRAUD

87. Definition.

88. Elements.

- (1) Statement of Fact.
- (2) Intent to Cause Action.
- (3) Action by Complainant.
- (4) Falsity.
- (5) Scierter.
- (6) Damage.

DEFINED

87. "Fraud consists in deception practiced in order to induce another to part with property or to surrender some legal right, and which accomplishes the end designed."¹

The question whether fraud has been committed may be raised in various ways. For example, the party injured may bring a common-law action for damages, or he may seek rescission or other relief in equity, or when sued upon an alleged obligation he may defend upon the ground of fraud practiced in its procurement, or he may proceed on the theory that the entire transaction is void, and seek to recover the property transferred, or treat the exercise of dominion over the same as a conversion. In equity, a broader interpretation is given to the term, which, it has been said, "properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another."² But, whether the subject

¹ 2 Cooley on Torts (3d Ed.) 905, quoted in *Beard v. Bliley*, 3 Colo. App. 479, 34 Pac. 271, 272; *Alexander v. Church*, 53 Conn. 561, 562, 4 Atl. 103; *FOTTLER v. MOSELEY*, 179 Mass. 295, 298, 60 N. E. 788, Chapin Cas. Torts, 215.

² 1 Story, Eq. Jur. § 187, quoted in *Sears v. Hicklin*, 13 Colo. 143,

be considered from the legal or equitable standpoint, it is inadvisable to attempt a definition, for as it is the very nature and essence of this tort "to elude all laws in fact without appearing to break them in form, a technical definition of fraud, making everything come within the scope of its words before the law could deal with it as such, would be, in effect, telling to the crafty precisely how to avoid the grasp of the law."³ We shall discuss fraud only as a common-law wrong, not as a ground for equitable relief.

Fraud usually results in an injury to property rights, and accordingly has been placed in that class. But this is not invariably the case. Thus, where a manufacturer of farm implements sold a land roller with a cross-grained wooden tongue having a knot and knot hole, which he had plugged and concealed by putty and paint, an action based on fraud is maintainable to recover damages for personal injuries suffered by one who had purchased the implement from a retail dealer.⁴ "The injury to one's person by the fraud of another is quite as serious as an injury to his pocket-book."⁵

153, 21 Pac. 1022; *Larson v. Williams*, 100 Iowa, 110, 118, 63 N. W. 464, 69 N. W. 441, 62 Am. St. Rep. 544; *City of Clay Center v. Myers*, 52 Kan. 363, 365, 35 Pac. 25; *Hatch v. Barrett*, 34 Kan. 223, 236, 8 Pac. 129; *Richardson v. Trimble*, 38 Hun (N. Y.) 409, 416; *Moore v. Crawford*, 130 U. S. 122, 128, 9 Sup. Ct. 447, 32 L. Ed. 878.

³ *McAleer v. Horsey*, 35 Md. 439, 452, per Miller, J. See *Hanger v. Evins*, 38 Ark. 334, 346; *Rhodes v. Dickerson*, 95 Mo. App. 395, 400, 69 S. W. 47; *Mortlock v. Buller*, 10 Ves. Jr. 292, 306, 32 Eng. Rep. 857.

⁴ *Kuelling v. Roderick Lean Mfg. Co.*, 183 N. Y. 78, 75 N. E. 1098, 2 L. R. A. (N. S.) 303, 111 Am. St. Rep. 691, 5 Ann. Cas. 124. For further illustrations, see *Allen v. Truesdell*, 135 Mass. 75; *KUJEK v. GOLDMAN*, 150 N. Y. 176, 44 N. E. 773, 34 L. R. A. 156, 55 Am. St. Rep. 670, Chapln Cas. Torts, 16 (loss of consortium); *Langridge v. Levy*, 2 M. & W. 519, affirmed 4 M. & W. 337. Cf. *Woodward v. Miller*, 119 Ga. 618, 46 S. E. 847, 64 L. R. A. 932, 100 Am. St. Rep. 188.

⁵ *Flaherty v. Till*, 119 Minn. 191, 192, 137 N. W. 815, per Start, C. J.

ELEMENTS

88. To establish fraud it must be proved that—

- (1) There was a statement or representation of a fact.
- (2) The statement or representation was made with the intent that complainant act thereon.
- (3) The complainant did act thereon.
- (4) The statement or representation was untrue.
- (5) The party making the statement or representation knew it to be false, or did not believe it to be true, or made it recklessly, not knowing or caring whether it were true or not.⁶
- (6) Damage proximately resulted to the complainant from the deception.

Tersely put, these elements are representation, falsity, scienter, deception, and injury.⁷ The burden rests upon the party alleging fraud to prove each of these elements. Fraud is never presumed.⁸ But this does not mean that direct evidence is required. "Experience shows that positive proof of fraudulent acts is not generally to be expected, and for that reason, among others, the law allows a resort to circumstances as the means of ascertaining the truth."⁹ "It is very seldom that frauds are so bunglingly executed as to admit of direct proof. Unless exposed by

⁶ While this is believed to be sanctioned by the weight of authority, many courts have dissented. See *infra*, p. 410 et seq.

⁷ *Arthur v. Griswold*, 55 N. Y. 400, 410; *Brackett v. Griswold*, 112 N. Y. 454, 467, 20 N. E. 376; *Ley v. Metropolitan Life Ins. Co.*, 120 Iowa, 203, 211, 94 N. W. 568. Cf. *Busterud v. Farrington*, 36 Minn. 320, 31 N. W. 360; *Byard v. Holmes*, 34 N. J. Law, 296; *Martin v. Eagle Development Co.*, 41 Or. 448, 69 Pac. 216; *Southern Development Co. v. Silva*, 125 U. S. 247, 8 Sup. Ct. 881, 31 L. Ed. 678.

⁸ *Ley v. Metropolitan Life Ins. Co.*, 120 Iowa, 203, 94 N. W. 568; *Wakeman v. Dalley*, 51 N. Y. 27, 10 Am. Rep. 551; *Southern Development Co. v. Silva*, 125 U. S. 247, 8 Sup. Ct. 881, 31 L. Ed. 678.

⁹ *Castle v. Bullard*, 23 How. (U. S.) 172, 187, 16 L. Ed. 424, per Clifford, J.

circumstantial evidence, they cannot generally be exposed at all."¹⁰

(1) Statement of Fact

This means a statement as to a past or an existing fact. A mere promise is not enough. Hence fraud is not shown where the owner of property was induced to convey it by an assurance that he would receive a bond to reconvey, which was never given.¹¹ But suppose that, when the promise was made, the promisor did not intend to perform. He has here misrepresented the condition of his mind, and "the state of a man's mind is as much a fact as the state of his digestion."¹² The principle is well illustrated where the vendor of goods, sold on credit to an insolvent vendee, seeks to rescind the contract and recover his merchandise. The mere fact that the vendee is insolvent does not necessarily show fraud. There must be a preconceived design not to pay,¹³ though his condition may be so hopeless that such an inference will be justified.¹⁴

¹⁰ *Stauffer v. Young*, 39 Pa. 455, 459, per Woodward, J.

¹¹ *LONG v. WOODMAN*, 58 Me. 49, Chaplin Cas. Torts, 205. To the same effect, *Smith v. Parker*, 148 Ind. 127, 45 N. E. 770 (promise to supply money for a business); *Dawe v. Morris*, 149 Mass. 188, 21 N. E. 313, 4 L. R. A. 158, 14 Am. St. Rep. 404 (promise to sell at a fixed price); *Esterly Harvesting Mach. Co. v. Berg*, 52 Neb. 147, 71 N. W. 952 (promise to make a machine give satisfaction); *Lexow v. Julian*, 21 Hun (N. Y.) 577, affirmed 86 N. Y. 638 (promise not to dispose of Stock Exchange seat); *Patterson v. Wright*, 64 Wis. 289, 25 N. W. 10 (promise to pay a claim).

¹² *Edgington v. Fitzmaurice*, L. R. 29 Ch. Div. 459, 483, per Bowen, L. J. In accord, *Dow v. Sanborn*, 3 Allen (Mass.) 181; *McCready v. Phillips*, 56 Neb. 446, 76 N. W. 885; *Devoe v. Brandt*, 53 N. Y. 462; *Swift v. Rounds*, 19 R. I. 527, 35 Atl. 45, 33 L. R. A. 561, 61 Am. St. Rep. 791.

¹³ The reasons are well stated in *Nichols v. Pinner*, 18 N. Y. 295, 299. It was not fraudulent in Pinner, said the court, "to make reasonable efforts to retrieve his fortune and to extricate himself from

¹⁴ *Edson v. Hudson*, 83 Mich. 450, 47 N. W. 347; *Leedom v. J. M. Ward Furniture, Stove & C. Co.*, 38 Mo. App. 425; *Wright v. Brown*, 67 N. Y. 1; *Mulliken v. Millar*, 12 R. I. 296; *Gillespie v. J. C. Piles & Co.*, 178 Fed. 886, 102 C. C. A. 120, 44 L. R. A. (N. S.) 1; *Kitson v. Farwell*, 132 Ill. 327, 23 N. E. 1024; *Backentoss v. Speicher*, 81 Pa. 324.

A prophecy or opinion is not a statement of fact. For example, fraud is not shown where a builder falsely stated what would be the cost of an unbuilt house;¹⁵ nor is it actionable for a seller falsely to state that a certain bond was an A No. 1 bond, even if he did so in bad faith.¹⁶ So representations of value are generally deemed mere expressions of opinion.¹⁷ It is at times very difficult to determine whether the statement is of fact or opinion.¹⁸ Logical-

his embarrassment. It is not unnatural that he should cling to the hope that better times would come, that to-morrow should be as this day and more abundant, and that with this hope, however delusive results may have shown it to be, he should have been impelled to buy more goods, contract new debts, and struggle on until some casualty should precipitate the catastrophe upon him, and he find himself in hopeless bankruptcy. This is an everyday experience in the commercial world; and it would be hard indeed if the unfortunate victim of hopes that looked to him at the time as reasonable must in his misfortunes be judged by the actual instead of the possible results." In accord, *Burrill v. Stevens*, 73 Me. 395, 40 Am. Rep. 366; *Talcott v. Henderson*, 31 Ohio St. 162, 27 Am. Rep. 501, note.

¹⁵ *Sweney v. Davidson*, 68 Iowa, 386, 27 N. W. 278; *Emmerson v. Hutchinson*, 63 Ill. App. 203.

¹⁶ *DEMING v. DARLING*, 148 Mass. 504, 20 N. E. 107, 2 L. R. A. 743, Chapin Cas. Torts, 207. To the same effect, *Holton v. Noble*, 83 Cal. 7, 23 Pac. 58; *Mumford v. Tolman*, 157 Ill. 258, 41 N. E. 617; *Clark v. Ralls*, 50 Iowa, 275; *Warner v. Benjamin*, 89 Wis. 290, 62 N. W. 179.

¹⁷ *Kincaid v. Price*, 82 Ark. 20, 100 S. W. 76; *Everist v. Drake* (1914) 26 Colo. App. 273, 143 Pac. 811; *Bossingham v. Syck*, 118 Iowa, 192, 91 N. W. 1047; *Mecum v. Mooyer*, 166 App. Div. 793, 152 N. Y. Supp. 385; *Ellis v. Andrews*, 56 N. Y. 83, 15 Am. Rep. 379, note; *Gordon v. Butler*, 105 U. S. 553, 26 L. Ed. 1166.

¹⁸ The following were deemed facts: That a patented improvement in machinery had been largely sold and successfully applied in many mills and was a practical success, that there was a large demand therefor, and that defendant was making the article and found it a good and profitable business (*Scholfield Gear & Pulley Co. v. Scholfield*, 71 Conn. 1, 40 Atl. 1046); that coal underlying a certain tract "showed almost invariably low sulphur, sulphur sufficiently low for the manufacture of metallurgical coke," etc. (*Hotchkiss v. Bon Air C. & I. Co.*, 108 Me. 34, 78 Atl. 1108); that a worthless medicine was a sure cure for cholera (*McDonald v. Smith* [1905] 139 Mich. 211, 102 N. W. 668); that the exterior of a building was fireproof, it being in part of wood (*Hickey v. Morrell*, 102 N. Y. 454, 7 N. E. 321, 55 Am. Rep. 824). Cf. *Marshall v. Seelig*, 49 App. Div. 433, 63 N. Y.

ly it would seem that statements by a proposed vendor that he had paid a certain price for the property were statements of fact,¹⁹ but by some courts they are put on a par with representations of value.²⁰ The boundaries of land are facts;²¹ also dimensions or acreage.²² Statements of

Supp. 355. The following were deemed opinion: That certain grading to be undertaken "contained 5,000 cubic yards of borrow and 10,000 cubic yards of waste" (*East v. Worthington*, 88 Ala. 537, 7 South. 189; to the same effect, *Nounnan v. Sutter County Land Co.*, 81 Cal. 1, 22 Pac. 515, 6 L. R. A. 219); that a grain screen would clean wheat rapidly and effectually (*Neidefer v. Chastain*, 71 Ind. 363, 36 Am. Rep. 198); that there was no dirt, smell, or smoke in the use of an apparatus, that it burned for a long time, and could be run for a small expense, etc. (*Kimball v. Bangs*, 144 Mass. 321, 11 N. E. 113); that a horse could travel a certain distance in a given time (*Cummings v. Cass*, 52 N. J. Law, 77, 18 Atl. 972).

¹⁹ *Zang v. Adams*, 23 Colo. 408, 48 Pac. 509, 58 Am. St. Rep. 249; *Holmes v. Rivers*, 145 Iowa, 702, 124 N. W. 801; *Thompson v. Koewing*, 79 N. J. Law, 246, 75 Atl. 752; *Fairchild v. McMahon*, 139 N. Y. 290, 34 N. E. 779, 36 Am. St. Rep. 701. See *Wustrack v. Hall* (1914) 95 Neb. 384, 145 N. W. 835.

²⁰ *Way v. Ryther*, 165 Mass. 226, 42 N. E. 1128; *Jones v. Thompson*, 8 Allen (Mass.) 334; *Holbrook v. Connor*, 60 Me. 578, 11 Am. Rep. 212; *Beare v. Wright*, 14 N. D. 26, 103 N. W. 632, 69 L. R. A. 409, 8 Ann. Cas. 1057. Cf. *Banta v. Palmer*, 47 Ill. 99; *Sowers v. Parker*, 59 Kan. 12, 51 Pac. 888. Aliter, where fiduciary relationship exists. *Hauk v. Brownell*, 120 Ill. 161, 11 N. E. 416. Cf. *Beare v. Wright*, *supra*.

²¹ *Foster v. Kennedy's Adm'r*, 38 Ala. 359, 81 Am. Dec. 56; *Smith v. Packard & Co.* (1911) 152 Iowa, 1, 130 N. W. 1076; *Leavitt v. Seaney* (1915) 113 Me. 119, 93 Atl. 46; *McGhee v. Bell*, 170 Mo. 121, 70 S. W. 493, 59 L. R. A. 761; *Beardsley v. Duntley*, 69 N. Y. 577. See *Ramsey v. Wallace*, 100 N. C. 75, 6 S. E. 638.

²² *O'Neill v. Conway*, 88 Conn. 651, 92 Atl. 425; *Boddy v. Henry*, 126 Iowa, 31, 101 N. W. 447; *Antle v. Sexton*, 137 Ill. 410, 27 N. E. 691; *Judd v. Walker*, 114 Mo. App. 128, 89 S. W. 558; *Coon v. Atwell*, 46 N. H. 510; *Cabot v. Christie*, 42 Vt. 121, 1 Am. Rep. 313. See *Shell v. Roseman*, 155 N. C. 90, 71 S. E. 86. But in Massachusetts it is held that, if the representations relate to "the number of acres within boundaries which are pointed out, they are not actionable, for they are to be regarded as the usual and ordinary means adopted by sellers to obtain a high price, and are always understood as affording to buyers no ground for omitting to make inquiries." *Mooney v. Miller*, 102 Mass. 217, 220, per Chapman, C. J.; *Mabardy v. McHugh*, 202 Mass. 148, 88 N. E. 894, 23 L. R. A. (N. S.) 487, 132 Am. St. Rep. 484, 16 Ann. Cas. 500. It is somewhat curious that the

law are in themselves mere expressions of opinion,²³ though the reason sometimes given that "every man is presumed to know the law"²⁴ is unsound, since there is no such presumption.²⁵

It is at times very difficult to draw the line. There is hardly any fact which, when stated, will not call for the expression of a legal opinion. "If you state that a man is the eldest son of a marriage, you state a question of law, because you must know that there has been a valid marriage and that that man was the first-born son after the marriage, or in some countries before. * * * If you state that a man is in possession of an estate of £10,000 a year, the notion of possession is a legal notion."²⁶ Yet there could be no doubt that these were statements of fact.²⁷

court refused to apply this rule where defendant had falsely stated the number of yards in carpets to one who had inspected them as they lay on the floor. *Lewis v. Jewell*, 151 Mass. 345, 24 N. E. 52, 21 Am. St. Rep. 454.

²³ *Beall v. McGehee*, 57 Ala. 438; *Champion v. Woods*, 79 Cal. 17, 21 Pac. 534, 12 Am. St. Rep. 126; *Dillman v. Nadlehofer*, 119 Ill. 567, 7 N. E. 88; *Abbott v. Treat*, 78 Me. 121, 3 Atl. 44; *Jaggar v. Winslow*, 30 Minn. 263, 15 N. W. 242; *Lexow v. Julian*, 21 Hun, 577, Id., 86 N. Y. 638; *Ætna Ins. Co. v. Reed*, 33 Ohio St. 283. Foreign law is deemed a fact. *Schnelder v. Schnelder*, 125 Iowa, 1, 98 N. W. 159; *Travelers' Protective Assn. of America v. Smith* (Ind. 1913) 101 N. E. 817; *Wood v. Roeder*, 50 Neb. 476, 70 N. W. 21. Cf. *Van Slochem v. Villard*, 207 N. Y. 587, 101 N. E. 467; *Brady v. Edwards*, 35 Misc. Rep. 435, 71 N. Y. Supp. 972.

²⁴ See *Beall v. McGehee*, *supra*; *Abbott v. Treat*, *supra*; *Burt v. Bowles*, 69 Ind. 1.

²⁵ In certain cases, "ignorance of the law excuses no one." This is very different.

²⁶ *Eaglesfield v. Marquis of Londonderry*, L. R. 4 Ch. D. 693, 703, per Jessel, M. R.

²⁷ The following were held statements of law, and hence mere matters of opinion: That a surviving wife would not be entitled to dower in lands sold by her husband during coverture (*Martin v. Wharton*, 38 Ala. 637); that a deed of trust is "not a good and subsisting lien" (*Dalrymple v. Craig*, 149 Mo. 345, 50 S. W. 884); that a certain legacy was as good as a mortgage, where its value depended on whether it was a charge upon testator's real estate (*Duffany v. Ferguson*, 66 N. Y. 482); that the National Lead Trust was a legal

But it is not always true that statements of opinion, including statements of law, cannot constitute fraud. For instance, "liability may arise where one has or assumes to have knowledge upon a subject of which the other is ignorant, and knowingly makes false statements on which the other relies";²⁸ nor will the general rule apply where the parties are not dealing at arm's length and on equal terms, the relation between them being one of trust and confidence.²⁹

To be actionable, the representation need not have been made in express terms. Thus, the drawer of a check, who obtains money on the strength thereof, knowing that he

organization, and legally entitled to issue certificates of shares (*Unckles v. Hentz*, 18 Misc. Rep. 644, 43 N. Y. Supp. 749, affirmed 19 App. Div. 165, 45 N. Y. Supp. 894). Cf. *Thompson v. Phoenix Ins. Co.*, 75 Me. 55, 46 Am. Rep. 357 (that the non-occupancy of an insured building rendered the policy void). But the following were held facts: That a trust deed is a first lien upon certain premises, and that there were no other trust deeds or mortgages ahead of it (*Kehl v. Abram*, 210 Ill. 218, 71 N. E. 347, 102 Am. St. Rep. 158); that a certain deed did not affect (cover) particular premises (*Dashiel v. Harshman*, 113 Iowa, 283, 85 N. W. 85); that a college had the right to grant a degree (*Kerr v. Shurtleff*, 218 Mass. 167, 105 N. E. 871); that defendant had attached plaintiff's fish traps (*Burns v. Lane*, 138 Mass. 350); that a certain mortgage did not exist (*Haight v. Hayt*, 19 N. Y. 464). Cf. *Kathan v. Comstock*, 140 Wis. 427, 122 N. W. 1044, 28 L. R. A. (N. S.) 201.

²⁸ *Hedin v. Minneapolis Medical & Surgical Institute*, 62 Minn. 146, 148, 64 N. W. 158, 35 L. R. A. 417, 54 Am. St. Rep. 628, per Collins, J., who added: "Where parties possess special learning or knowledge on the subject with respect to which their opinions are given, such opinions are capable of approximating to the truth; and for a false statement of them, when deception is designed, and injury has followed from reliance on the opinions, an action will lie." To the same effect, *Blewer v. Mueller*, 254 Ill. 315, 98 N. E. 548; *Board of Water Com'rs of City of New London v. Robbins*, 82 Conn. 623, 74 Atl. 938; *Kinney v. Dodge*, 101 Ind. 573; *Picard v. McCormick*, 11 Mich. 68; *Conlan v. Roemer*, 52 N. J. Law, 53, 18 Atl. 858; *Marshall v. Seelig*, 49 App. Div. 433, 63 N. Y. Supp. 355; *Powell v. Fletcher*, 18 N. Y. Supp. 451; *Moreland v. Atchison*, 19 Tex. 303.

²⁹ *Manley v. Felty*, 146 Ind. 194, 45 N. E. 74; *Fisher v. Budlong*, 10 R. I. 525; *Allen v. Frawley*, 106 Wis. 638, 82 N. W. 593. See *Townsend v. Cowles*, 31 Ala. 428; *Nolte v. Reichelm*, 96 Ill. 425; *Hubbard v. McLean*, 115 Wis. 9, 90 N. W. 1077.

has no funds on hand to meet it, and being without any reasonable expectations that it will be paid, is guilty of fraud, though he never stated in so many words that the check was good.⁸⁰ Further illustrations are given in the note.⁸¹

Generally mere silence is not fraudulent.⁸² But it must be "*mere*" silence. Resort may not be had to trick or artifice. Thus, fraud is shown where the vendors of a vessel caused her to be taken from the ways previous to sale and kept afloat, so that the worm-eaten condition of the hull could not be discovered; and this, though the sale was "with all faults," for that does not mean "with all frauds."⁸³ Again, though the owner of a house which is in a ruinous and unsafe condition may be under no duty to inform a prospective tenant that it is unfit for habitation,⁸⁴ he may not conceal the defects with plaster and paper.⁸⁵ Furthermore, concealment will be actionable where there has been "such a partial and fragmentary statement of fact as that the withholding of that which is not stated makes that which is stated absolutely false."⁸⁶ Thus a purchaser, when buying on credit, is not bound to disclose the

⁸⁰ *Eastern Trust & Banking Co. v. Cunningham*, 103 Me. 455, 70 Atl. 17; *Steling v. Clark*, 18 Misc. Rep. 464, 41 N. Y. Supp. 982; *Mussiller v. Rice*, 116 N. Y. Supp. 1028. Cf. *City Nat. Bank of Selma v. Burns*, 68 Ala. 267, 44 Am. Rep. 138.

⁸¹ *Baker v. Hallam*, 103 Iowa, 43, 72 N. W. 419; *James v. Crowthwait*, 97 Ga. 673, 25 S. E. 754, 36 L. R. A. 631; *Welkel v. Sterns*, 142 Ky. 513, 134 S. W. 908, 34 L. R. A. (N. S.) 1035; *Smith v. Kingman & Co.*, 70 Minn. 453, 73 N. W. 253; *People v. O'Brien*, 209 N. Y. 366, 103 N. E. 710; *Blossom v. Barrett*, 37 N. Y. 434, 97 Am. Dec. 747; *Dirks Trust & Title Co. v. Koch* (1913) 32 S. D. 551, 143 N. W. 952, 49 L. R. A. (N. S.) 513.

⁸² *Boileau v. Records & Breen* (1913) 165 Iowa, 134, 144 N. W. 336; *Cocke v. Greene*, 180 Mass. 525, 62 N. E. 1053; *Crowell v. Jackson*, 53 N. J. Law, 656, 23 Atl. 426; *Graham v. Meyer*, 99 N. Y. 611, 1 N. E. 143; *Iron City Nat. Bank of Pittsburg v. Du Puy*, 194 Pa. 205, 44 Atl. 1066.

⁸³ *Schneider v. Heath*, 3 Campb. 506.

⁸⁴ *Keats v. Earl of Cadogen*, 10 C. B. 591.

⁸⁵ See *Pickering v. Dowson*, 4 Taunt. 779. For further illustrations, see *Welkel v. Sterns*, 142 Ky. 513, 134 S. W. 908, 34 L. R. A. (N. S.) 1035; *Kuelling v. Roderick Lean Mfg. Co.*, 183 N. Y. 78, 75 N. E. 1098, 2 L. R. A. (N. S.) 303, 111 Am. St. Rep. 691, 5 Ann. Cas. 124. Cf. *Lancaster County Bank v. Albright*, 21 Pa. 228.

⁸⁶ Lord Cairns in *Peek v. Gurney*, L. R. 6 H. L. 377, 403.

facts of his financial condition. But if he undertake to answer an inquiry concerning such condition, he is bound to tell the whole truth. "To tell half a truth only is to conceal the other half. Concealment of this kind under the circumstances amounts to a false representation."³⁷ Again, the doctrine of *caveat emptor* will not be applied where "the means of information are not equally accessible to both, but exclusively within the knowledge of one of the parties, and known to be material to a correct understanding of the subject, and especially where one of the parties relies upon the other to communicate to him the true state of facts, to enable him to judge of the expediency of the bargain."³⁸ Here a *suppressio veri* is equivalent to a *suggestio falsi*, or, put another way, an express representation may be inferred from circumstances. Thus, fraud was deemed established where a tenant had induced his landlord to accept an insolvent person in his stead, being aware of, though not making known, such insolvency.³⁹ Manifestly it is impossible to fix the exact limits of this principle. Perhaps it is best illustrated by cases where the vendor fails to disclose a latent defect in the article sold, which is known to him,⁴⁰ or where he is aware that the article is sold for a particular purpose and suppresses a fact which makes it unfit for the purpose.⁴¹

³⁷ *Newell v. Randall*, 32 Minn. 171, 173, 19 N. W. 972, 50 Am. Rep. 562, per Mitchell, J. For further illustrations, see *Edward Malley Co. v. Button*, 77 Conn. 571, 60 Atl. 125; *James v. Crosthwait*, 97 Ga. 673, 23 S. E. 754, 36 L. R. A. 631; *Atwood v. Chapman*, 68 Me. 38, 28 Am. Rep. 5; *KIDNEY v. STODDARD*, 7 Metc. (Mass.) 252, *Chapin Cas. Torts*, 209; *Baker v. Seahorn*, 31 Tenn. (1 Swan) 54, 55 Am. Dec. 724.

³⁸ *Prentiss v. Russ*, 16 Me. 30, 32; *Atwood v. Chapman*, 68 Me. 38, 41, 28 Am. Rep. 5.

³⁹ *Bruce v. Ruler*, 2 Mann. & Ryl. 3, 17 E. C. L. 700. For further illustrations, see *Norris v. McFadden*, 159 Mich. 424, 124 N. W. 54; *Paddock v. Strobridge*, 29 Vt. 470; *Loewer v. Harris*, 57 Fed. 368, 6 C. C. A. 394; *Hill v. Gray*, 1 Stark, 434, 2 E. C. L. 167. Cf. *Rothmiller v. Stein*, 143 N. Y. 581, 38 N. E. 718, 26 L. R. A. 148.

⁴⁰ *Grigsby v. Stapleton*, 94 Mo. 423, 7 S. W. 421; *Jones v. Edwards*, 1 Neb. 170; *Jeffrey v. Bigelow*, 13 Wend. (N. Y.) 518, 28 Am. Dec. 476; *Cardwell v. McClelland*, 35 Tenn. (3 Sneed) 150. Cf. *Sockman v. Kelm* (1909) 19 N. D. 317, 124 N. W. 64.

⁴¹ *Welkel v. Sterns*, 142 Ky. 513, 134 S. W. 908, 34 L. R. A. (N. S.)

(2) Intent to Cause Action

It is essential that there should have been a purpose to influence complainant's conduct,⁴² though the representations need not have been made directly to him. They are none the less actionable if made to another, provided an intent be found to exist in the party making them that they be communicated to the complainant. "A representation made to one person, with the intention that it shall reach the ears of another and be acted upon by him, and is acted upon by him to his injury, gives the person so acting upon it the same right to relief or redress as if it had been made to him directly."⁴³ This principle is peculiarly applicable to the case of statements furnished to mercantile agencies. Almost invariably there can here be no intent other than to have the information supplied to those who seek guidance in extending credit.⁴⁴ It also may apply where a director or promoter issues or sanctions the circulation of a prospectus,⁴⁵ or bond.⁴⁶ Further illustrations are given in the note.⁴⁷ If the statement is contained in a report required

1035; *French v. Vining*, 102 Mass. 132, 3 Am. Rep. 440; *Van Bracklin v. Fonda*, 12 Johns. (N. Y.) 468, 7 Am. Dec. 339; *Maynard v. Maynard*, 49 Vt. 297.

⁴² *Steiner v. Clisby*, 103 Ala. 181, 15 South. 612; *Bank of Atchison County v. Byers*, 139 Mo. 627, 41 S. W. 325; *Wells v. Cook*, 16 Ohio St. 67, 88 Am. Dec. 436n; *Butterfield v. Barber*, 20 R. I. 99, 37 Atl. 532; *Langridge v. Levy*, 2 M. & W. 519.

⁴³ *HENRY v. DENNIS*, 95 Me. 24, 29, 49 Atl. 58, 85 Am. St. Rep. 365, *Chapin Cas. Torts*, 212, per Wiswell, C. J.

⁴⁴ *Moyer v. Lederer*, 50 Ill. App. 94; *Hinchman v. Weeks*, 85 Mich. 535, 48 N. W. 790; *Tindle v. Birkett*, 171 N. Y. 520, 64 N. E. 210, 89 Am. St. Rep. 822; *Eaton, Cole & Burnham Co. v. Avery*, 83 N. Y. 31, 38 Am. Rep. 389; *Katzenstein v. Reid, Murdock & Co.* (1905) 41 Tex. Civ. App. 106, 91 S. W. 360.

⁴⁵ *Downey v. Finucane*, 205 N. Y. 251, 98 N. E. 391, 40 L. R. A. (N. S.) 307; *Morgan v. Skiddy*, 62 N. Y. 319. In *Peek v. Gurney*, L. R. 6 H. L. 377, relief was denied to one not an original allottee. But see *Andrews v. Mockford* (1896) L. R. 1 Q. B. 372.

⁴⁶ *Clark v. Edgar*, 84 Mo. 106, 54 Am. Rep. 84, affirming 12 Mo. App. 345; *Stickel v. Atwood*, 25 R. I. 456, 56 Atl. 687.

⁴⁷ *HENRY v. DENNIS*, 95 Me. 24, 49 Atl. 58, 85 Am. St. Rep. 365, *Chapin Cas. Torts*, 212; *Nash v. Minnesota Title Insurance & Trust Co.*, 159 Mass. 437, 34 N. E. 625; *Chubbuck v. Cleveland*, 37 Minn.

to be filed in a public office, the liability of the signers to one induced thereby to deal with the corporation or purchase its stock will require a determination whether the object of the statute was to furnish information to the public, or only to public officials. It thus becomes a question whether the signers should have known that such a one as the complainant would act thereon. It would appear that such statutes are not generally considered to have been enacted for the benefit of individual members of the community.⁴⁸

It must be emphasized that what is required is the intent to cause action. Motive is immaterial. Misrepresentations "are frequently made from inconsiderate good nature, prompting a desire to benefit a third person, and without a view of advancing the party's own interests. But the motives by which he was actuated do not enter into the inquiry."⁴⁹

(3) Action by Complainant

Usually plaintiff has acted. But he may have refrained from doing what he would have done, save for the fraud practiced upon him. For instance, "so far as respects the owner of property, his change of conduct between keeping the property, on the one hand, and selling it, on the other, is equally great, whether the first intended action be to

466, 35 N. W. 362, 5 Am. St. Rep. 864; *Keeler v. Seaman*, 47 Misc. Rep. 292, 95 N. Y. Supp. 920; *Denton v. Great Northern Ry.*, 5 El. & Bl. 860.

⁴⁸ For the information of public officials only. *Hunnewell v. Duxbury*, 154 Mass. 286, 28 N. E. 267, 13 L. R. A. 733; *McKee v. Rudd*, 222 Mo. 344, 121 S. W. 312, 133 Am. St. Rep. 529; *Webb v. Rockefeller*, 195 Mo. 57, 93 S. W. 772, 6 L. R. A. (N. S.) 872; *Hindman v. First Nat. Bank*, 112 Fed. 931, 50 C. C. A. 623, 57 L. R. A. 108. For the benefit of one acting thereon. *Macdonald v. De Fremery* (1914) 168 Cal. 189, 142 Pac. 73; *Warfield v. Clark*, 118 Iowa, 69, 91 N. W. 833; *Gerner v. Mosher*, 58 Neb. 135, 78 N. W. 384, 46 L. R. A. 244.

⁴⁹ *Boyd's Ex'rs v. Browne*, 6 Pa. 310, 316, per Bell, J. To the same effect, *Carpenter v. Wright*, 52 Kan. 221, 34 Pac. 798; *Stoney Creek Woolen Co. v. Smalley*, 111 Mich. 321, 69 N. W. 722; *Cowley v. Smyth*, 46 N. J. Law, 380, 50 Am. Rep. 432; *Foster v. Charles*, 7 Bing. 105; *Pasley v. Freeman*, 3 Term Rep. 51. Cf. *Rothmiller v. Stein*, 143 N. Y. 581, 38 N. E. 718, 26 L. R. A. 148.

keep or to sell.”⁵⁰ In either event, he cannot be heard to complain where his conduct was not influenced by the misrepresentations.⁵¹ Thus there can be no recovery, if he was unaware of the latter at the time he acted,⁵² or if he knew or believed them to be false.⁵³ Nor may he recover if he relied upon information obtained from other sources and acted upon his own judgment.⁵⁴ “A mere naked lie—a falsehood—though told with intent to deceive, upon which nobody acts, and by which nobody is deceived, is not actionable.”⁵⁵ Thus a declaration sets forth no cause of action where it merely alleges that the defendant falsely and fraudulently represented that he had a valid claim against the plaintiffs for damages, that the plaintiffs relied upon the representations, and that they investigated them at a large expense and found them to be false. “One or the other of the last two allegations is as untruthful as the representations are claimed to be; both cannot be true. If the plaintiffs relied upon the representations, they did not

⁵⁰ *FOTTLER v. MOSELEY*, 179 Mass. 295, 299, 60 N. E. 788, Chapin Cas. Torts, 215, per Hammond, J. To the same effect, *Rhodes v. Dickerson*, 95 Mo. App. 395, 69 S. W. 47; *Ross v. W. D. Cleveland & Sons* (Tex. Civ. App. 1910) 133 S. W. 315; *Butler v. Watkins*, 13 Wall. (U. S.) 456, 20 L. Ed. 629; *Barley v. Walford*, 9 Ad. & El. N. S. 197. So a third party may have been prompted to refrain from acting. *Rice v. Manley*, 66 N. Y. 82, 23 Am. Rep. 30.

⁵¹ *Burnett v. Hensley*, 118 Iowa, 575, 92 N. W. 678; *Duryea v. Zimmerman*, 143 App. Div. 60, 127 N. Y. Supp. 664; *Powell v. F. C. Linde Co.*, 58 App. Div. 261, 68 N. Y. Supp. 1070, affirmed 171 N. Y. 675, 64 N. E. 1125; *Chemical Bank v. Lyons* (C. C.) 137 Fed. 976.

⁵² *Burnett v. Hensley*, 118 Iowa, 575, 92 N. W. 678; *Brackett v. Griswold*, 112 N. Y. 454, 20 N. E. 376.

⁵³ *Hooper v. Whitaker*, 130 Ala. 324, 30 South. 355; *Bowman v. Carithers*, 40 Ind. 90; *Raffel v. Epworth*, 107 Mich. 143, 64 N. W. 1052; *Bradford v. Wright*, 145 Mo. App. 623, 123 S. W. 108; *Lembek v. Gerken* (1914) 86 N. J. Law, 111, 90 Atl. 698; *Vernol v. Vernol*, 63 N. Y. 45; *Bailey v. Frazier* (1912) 62 Or. 142, 125 Pac. 643.

⁵⁴ *Bradley v. Ovlatt* (1912) 86 Conn. 63, 84 Atl. 321, 42 L. R. A. (N. S.) 828; *Craig v. Hamilton*, 118 Ind. 565, 21 N. E. 315; *Warren v. Ritchie*, 128 Mo. 311, 30 S. W. 1023; *Grael v. Wolfe*, 185 Pa. 83, 39 Atl. 819; *Southern Development Co. v. Silva*, 125 U. S. 247, 8 Sup. Ct. 881, 31 L. Ed. 678; *Slaughter v. Gerson*, 13 Wall. (U. S.) 379, 20 L. Ed. 627.

⁵⁵ *Enfield v. Colburn*, 63 N. H. 218, 219, per Carpenter, J.

investigate them; if they investigated them, they did not rely upon them. It is a perversion of language to say that they did both.”⁵⁶ It is not, however, essential to a recovery that the representations “should have been the sole, or even the predominant, motive; it is enough that they had material influence upon the plaintiff, although combined with other motives.”⁵⁷

Redress will not be denied merely because the representation was of such a character that a man of ordinary care and caution would not have been deceived. “No rogue should enjoy his ill-gotten plunder for the simple reason that his victim is by chance a fool.”⁵⁸ It is possible, of course, for the statement to be too preposterous for belief—e. g., that certain eyeglasses had been treated by a chemical preparation which imparted a quality that made them fit the eye indefinitely; that the glasses, once fitted, would always adapt themselves to the eye.⁵⁹ Such a case, however, must be exceptional. It seems best to say that “if the representations were so extravagant that sensible, cautious people would not have believed them, that is a proper consideration for the jury in determining whether the plaintiff believed and relied upon them; but it does not preclude a finding that plaintiff did so, nor relieve the defendant from liability for his fraud, if he committed fraud. It is as much an actionable fraud willfully to deceive a credulous person

⁵⁶ *Enfield v. Colburn*, *supra*.

⁵⁷ *Safford v. Grout*, 120 Mass. 20, 25, per Colt, J. To the same effect, *Jordan v. Pickett*, 78 Ala. 331; *Braley v. Powers*, 92 Me. 203, 42 Atl. 362; *Massey v. Luce*, 158 Mich. 128, 122 N. W. 514; *Strong v. Strong*, 102 N. Y. 69, 5 N. E. 799; *Handy v. Waldron*, 19 R. I. 618, 35 Atl. 884.

⁵⁸ *Chamberlin v. Fuller*, 59 Vt. 247, 256, 9 Atl. 832. “The design of the law is to protect the weak and credulous from the wiles and stratagems of the artful and cunning, as well as those whose vigilance and sagacity enable them to protect themselves. * * * The law is not blind to the fact that communities are composed of individuals of several degrees of intelligence and capacity.” *Ingalls v. Miller*, 121 Ind. 188, 191, 22 N. E. 995.

⁵⁹ *H. Hirschberg Optical Co. v. Michaelson* (1901) 1 Neb. Unof. 137, 95 N. W. 461. To the same effect, *Ellis v. Newbrough*, 6 N. M. 181, 27 Pac. 490.

with an improbable falsehood, as it is to deceive a cautious, sagacious person with a plausible one.”⁶⁰

Is the one to whom the representation has been made under a duty to investigate its truth? The general principle is sometimes asserted that if the means of knowledge are at hand and equally available, and the subject-matter open to the inspection of both parties alike, the injured person must not neglect to make use of the means of information existing at the time.⁶¹ It is evident, however, that this doctrine must be applied with extreme caution. Thus, on the one hand, there should be no recovery where defendant had falsely represented the nonexistence of a noxious weed, when plaintiff, an experienced farmer, had inspected the farm on which it was growing and could have discovered its existence, had he taken ordinary pains to look for it.⁶² Here the falsity was obvious. Plaintiff had simply refused to use his eyes.⁶³ But, on the other hand, the principle cannot be invoked where at the time of the examination the farm was covered with snow, precluding investigation of its productiveness,⁶⁴ or where the land was at a distance, and no examination had in fact been made.⁶⁵

⁶⁰ *Barndt v. Frederick*, 78 Wis. 1, 11, 47 N. W. 6, 11 L. R. A. 199, per Lyon, J. (statement that a mining company had \$1,500,000 of ore on the surface ready for crushing). Cf. *King v. Livingston Mfg. Co.* (1912) 180 Ala. 118, 60 South. 143; *Porter v. United Rys. Co. of St. Louis* (1912) 165 Mo. App. 619, 148 S. W. 162.

⁶¹ See *Champion v. Woods*, 79 Cal. 17, 21 Pac. 534, 12 Am. St. Rep. 126; *Hart v. Waldo*, 117 Ga. 590, 43 S. E. 998; *De Grasse v. Verona Min. Co.* (1915) 185 Mich. 514, 152 N. W. 242; *Brauckman v. Leighton*, 60 Mo. App. 38; *Slaughter v. Gerson*, 13 Wall. (U. S.) 379, 20 L. Ed. 627.

⁶² *Long v. Warren*, 68 N. Y. 426.

⁶³ To the same effect, see *Moore v. Howe*, 115 Iowa, 62, 87 N. W. 750; *Kaiser v. Nummendor*, 120 Wis. 234, 97 N. W. 932; *Slaughter v. Gerson*, 13 Wall. (U. S.) 379, 20 L. Ed. 627.

⁶⁴ *Martin v. Jordan*, 60 Me. 531. See *Ladner v. Balsley*, 103 Iowa, 674, 72 N. W. 787, holding that the question whether due care had been used was for the jury, where the land was too muddy to permit inspection.

⁶⁵ *Ladd v. Pigott*, 114 Ill. 647, 2 N. E. 503; *Godfrey v. Olson* (1912) 68 Wash. 59, 122 Pac. 1014; *Smith v. Richards*, 13 Pet. (U. S.) 26, 10 L. Ed. 42. Cf. *Brandt v. Krogh* (1910) 14 Cal. App. 39, 111 Pac. 275.

In fine, while a failure to note obvious defects or inconsistencies might well be sufficient ground for refusing relief, there would seem no reason why such effect should be given to a mere failure to investigate. "It is no excuse for, nor does it lie in the mouth of, the defendant to aver that plaintiff might have discovered the wrong and prevented its accomplishment, had he exercised watchfulness, because this is but equivalent to saying, 'You trusted me, therefore I had the right to betray you.'"⁶⁶ For example, plaintiff should be permitted to recover for false representations concerning the title to or extent of the property purchased, though he might have discovered their falsity had he consulted the public records,⁶⁷ and so should the purchaser of stock in a corporation, though by employing an accountant he might have ascertained the falsity of representations concerning its condition.⁶⁸ Certainly defendant should not escape where his conduct has been such that plaintiff has been thrown off his guard and induced to omit inquiry or examination which otherwise he would have made,⁶⁹ or where confidential relations exist.⁷⁰

⁶⁶ *Pomeroy v. Benton*, 57 Mo. 531, 542, per Sherwood, J.; *Cottrill v. Krum*, 100 Mo. 397, 405, 13 S. W. 753, 18 Am. St. Rep. 549. To the same effect, *Hale v. Philbrick*, 42 Iowa, 81; *Foley v. Holtry*, 43 Neb. 133, 61 N. W. 120; *Wilcox v. American Telephone & Telegraph Co.*, 176 N. Y. 115, 68 N. E. 153, 98 Am. St. Rep. 650; *David v. Moore* (1905) 79 Pac. 415, 46 Or. 148; *Hingston v. L. P. & J. A. Smith Co.*, 114 Fed. 294, 52 C. C. A. 206. "Any different doctrine, carried to its logical conclusion, would facilitate transactions in gold bricks, salted mines, bogus diamonds as real, fac similes as originals, and would permit a variety of things destructive to commercial integrity." *Crompton v. Beedle*, 83 Vt. 287, 302, 75 Atl. 331, 30 L. R. A. (N. S.) 748, Ann. Cas. 1912A, 399, per Hasleton, J.

⁶⁷ *Kehl v. Abram*, 210 Ill. 218, 71 N. E. 347, 102 Am. St. Rep. 158; *Riley v. Bell*, 120 Iowa, 618, 95 N. W. 170; *David v. Park*, 103 Mass. 501; *Mead v. Bunn*, 32 N. Y. 275; *Blumenfeld v. Stine*, 42 Misc. Rep. 411, 87 N. Y. Supp. 81; *Hunt v. Barker*, 22 R. I. 18, 46 Atl. 46, 84 Am. St. Rep. 812.

⁶⁸ *JACOBSEN v. WHITELEY*, 138 Wis. 434, 120 N. W. 285, Chapin Cas. Torts, 218.

⁶⁹ *Stewart v. Stearns*, 63 N. H. 99, 56 Am. Rep. 496; *Schumaker v. Mather*, 133 N. Y. 590, 30 N. E. 755; *May v. Loomis*, 140 N. C. 350, 52 S. E. 728; *Strand v. Griffith*, 97 Fed. 854, 38 C. C. A. 444.

⁷⁰ *King v. White*, 119 Ala. 429, 24 South. 710; *Vance v. Supreme*

(4) Falsity

If the statement was not in fact false when made, there is ordinarily no ground for complaint.⁷¹ It has been said, however, that "in order to establish a case of false representation it is not necessary that something which is false should have been stated as if it were true. If the presentation of that which is true creates an impression which is false, it is as to him who, seeing the misapprehension, seeks to profit by it, a case of false representation,"⁷² and, as previously stated,⁷³ a half truth may be equivalent to a lie. So recovery may be had, though the representation was true when made, if to the knowledge of the party making it, events occur which render such representation false when it is acted upon, and he fails to correct the misapprehension.⁷⁴

(5) Defendant's Knowledge of Falsity

The action of deceit is based upon defendant's moral delinquency, and therefore his knowledge of the falsity of his representation, or what in law is equivalent to knowledge, must be alleged and proved.⁷⁵ It is necessary here to note

Lodge of Fraternal Brotherhood (1911) 15 Cal. App. 178, 114 Pac. 83; Faust v. Hosford, 119 Iowa, 97, 93 N. W. 58; Gray v. Reeves (1912) 69 Wash. 374, 125 Pac. 162.

⁷¹ Wesselhoeft v. Schanze, 153 Ill. App. 443; Allison v. Jack, 76 Iowa, 205, 40 N. W. 811; Putney v. Hardy, 99 Mass. 5. See Ide v. Graham, 3 Misc. Rep. 151, 22 N. Y. Supp. 709, 51 N. Y. St. Rep. 490.

⁷² LOMERSON v. JOHNSTON, 47 N. J. Eq. 312, 314, 20 Atl. 675, 24 Am. St. Rep. 410, Chapin Cas. Torts, 222, per Garrison, J. Here the effect of the statements was to cause a wife to apprehend the immediate arrest of her husband. To the same effect, Mulligan v. Bailey, 28 Ga. 507; Moens v. Heyworth, 10 M. & W. 147, 10 L. J. Ex. 177. Cf. Denny v. Gilman, 26 Me. 149; Match v. Hunt, 38 Mich. 1; Jones v. Commercial Travelers' Mut. Acc. Ass'n, 114 N. Y. Supp. 589, affirmed 134 App. Div. 936, 118 N. Y. Supp. 1116.

⁷³ See supra, page 402.

⁷⁴ Janes v. Trustees, 17 Ga. 515; Loewer v. Harris, 57 Fed. 368, 6 C. C. A. 394. Cf. Mooney v. Davis, 75 Mich. 188, 42 N. W. 802, 13 Am. St. Rep. 425; Davies v. L. & P. M. Ins. Co., L. R. 8 Ch. D. 469. Fraud is established if the purchaser receive goods, intending not to pay for them, although, when the goods were ordered, he had intended to pay. Whitten v. Fitzwater, 129 N. Y. 626, 29 N. E. 298. Contra, In re Levi v. Pickard (D. C.) 148 Fed. 654.

⁷⁵ Davis v. Central Land Co. (1913) 162 Iowa, 269, 143 N. W. 1073,

the distinction between actions at law and in equity. "Where rescission is claimed, it is only necessary to prove that there was misrepresentation; then, however honestly it may have been made, however free from blame the person who made it, the contract, having been obtained by misrepresentation, cannot stand."⁷⁶ In an action on deceit, on the contrary, it is not enough to establish misrepresentation alone; it is conceded on all hands that something must be proved to cast liability on the defendant, though it has been a matter of controversy what additional elements are requisite."⁷⁷ In the celebrated case of *Derry v. Peek*,⁷⁸ it was declared that fraud is proved when it is shown that a false representation has been made: (1) Knowingly;⁷⁹ or (2) without belief in its truth;⁸⁰ or (3) recklessly, careless whether it be true or false.⁸¹ It will be observed that the defendant's honest belief is here made the test. It is not enough that he was negligent.⁸² Thus the New

49 L. R. A. (N. S.) 1219; *Trimble v. Reid*, 97 Ky. 713, 31 S. W. 861; *Hartford Live Stock Ins. Co. v. Matthews*, 102 Mass. 221; *Adams v. Barber* (1911) 157 Mo. App. 370, 139 S. W. 489; *Inderlied v. Honeywell*, 88 App. Div. 144, 84 N. Y. Supp. 333; *Cobb v. Peters* (1913) 68 Or. 14, 136 Pac. 656; *Kimber v. Young*, 137 Fed. 744, 70 C. C. A. 178.

⁷⁶ *Welse v. Grove* (1904) 123 Iowa, 585, 99 N. W. 191; *Spurr v. Benedict*, 99 Mass. 465; *Martin v. Hill*, 41 Minn. 337, 43 N. W. 337; *Phillips v. Hollister*, 2 Cold. (Tenn.) 269; *Smith v. Richards*, 13 Pet. (U. S.) 26, 10 L. Ed. 42. Cf. *Bank of Atchison Co. v. Byers*, 139 Mo. 627, 653, 41 S. W. 325, 332; *Cowley v. Smyth*, 46 N. J. Law, 380, 50 Am. St. Rep. 432; *Hindman v. First Nat. Bank*, 112 Fed. 931, 944, 50 C. C. A. 623, 57 L. R. A. 108; *In re Reese River Silver Mining Co.*, L. R. 2 Ch. App. 604.

⁷⁷ *DERRY v. PEEK*, L. R. 14 App. Cas. 337, 359, 54 J. P. 148, 61 L. T. Rep. N. S. 265, Chapin Cas. Torts, 223, per Lord Herschell.

⁷⁸ *Supra*, *DERRY v. PEEK*, 14 App. Cas. at page 374, Chapin Cas. Torts, 223.

⁷⁹ As in *Foster v. Charles*, 6 Bing. 396, 7 Bing. 105; *Polhill v. Walter*, 3 B. & Ad. 114. Cf. *McAleer v. Horsey*, 35 Md. 439; *Helberg v. Hosmer*, 143 Wis. 620, 128 N. W. 439.

⁸⁰ Cf. *Shackett v. Bickford*, 74 N. H. 57, 65 Atl. 252, 7 L. R. A. (N. S.) 646, 124 Am. St. Rep. 933; *Howard v. Gould*, 28 Vt. 523, 67 Am. Dec. 728.

⁸¹ *Shackett v. Bickford*, *supra*; *Aitken v. Bjerkvig* (1915) 77 Or. 397, 150 Pac. 278.

⁸² *Le Lievre v. Gould*, [1893] 1 Q. B. 491, 57 J. P. 484, 62 L. J. Q. B.

York Court of Appeals observed that "intentional fraud, as distinguished from a mere breach of duty or the omission to use due care, is an essential factor in an action for deceit. * * * If, through inattention, want of judgment, reliance upon information which a wiser man might not credit, misconception of the facts, or of his moral obligation to inquire, he makes a representation designed to influence the conduct of another, and upon which the other acts to his prejudice, yet if the misrepresentation was honestly made, believing it to be true, whatever other liability he may incur, he cannot be made liable in an action for deceit."⁸³ This, it would seem, is the prevailing view. But there is strong authority to the contrary.⁸⁴ But, though

353, 68 L. T. Rep. N. S. 626, 41 Wkly. Rep. 468; *Angus v. Clifford* (1891) L. R. 2 Ch. 449. There has been a statutory change respecting the liability of directors and promoters. St. 53 & 54 Vict. c. 64 (Directors' Liability Act of 1890).

⁸³ *Kountze v. Kennedy*, 147 N. Y. 124, 129, 41 N. E. 414, 29 L. R. A. 360, 49 Am. St. Rep. 651, per Andrews, C. J. To same effect, *Boddy v. Henry*, 113 Iowa, 462, 85 N. W. 771, 53 L. R. A. 769; *Cahill v. Applegarth*, 98 Md. 493, 56 Atl. 794; *Nash v. Minnesota Title Insurance & Trust Co.*, 163 Mass. 574, 40 N. E. 1039, 28 L. R. A. 753, 47 Am. Rep. 489; *Ray County Sav. Bank v. Hutton*, 224 Mo. 42, 123 S. W. 47; *Pittsburg Life & Trust Co. v. Northern Cent. Life Ins. Co.* (C. C.) 140 Fed. 888; *Id.*, 148 Fed. 674, 78 C. C. A. 408: "Whether he had a belief and honestly expressed it was in issue, but the reasonableness of his ground for that belief could not be called into question." *Lemberton v. Dunham*, 165 Pa. 129, 132, 30 Atl. 716, per Fell, J.

⁸⁴ In Alabama a distinction is drawn between representations by strangers and by parties to the transaction. *Foster v. Kennedy's Adm'r*, 38 Ala. 359, 81 Am. Dec. 56; *Einstein v. Marshall*, 58 Ala. 153, 29 Am. Rep. 729. California by statute (Civ. Code, § 1572, subd. 2) has declared that fraud may consist in "the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true." *Mayer v. Salazar*, 84 Cal. 646, 24 Pac. 597. A similar provision is contained in the South Dakota Civil Code (section 1201, subd. 2). *McCabe v. Desnoyers*, 20 S. D. 581, 108 N. W. 341. The Supreme Court of Florida has said that "an averment that defendant's situation or means of knowledge were such as made it his duty to know whether his statement was true or false, and an averment that defendant well knew his statements to be untrue, are but different methods of stating the same ultimate fact, viz. knowledge." *Watson v. Jones*, 41 Fla.

defendant's negligence is not the determinative point, evidence may nevertheless be received to show the existence of want of care, or of reasonable grounds for his belief, for it may prove of great assistance in determining what his state of mind really was.⁸⁵ Furthermore, to the doctrine that

241, 25 South. 678, 682. In Georgia, "misrepresentation of a material fact, made willfully to deceive, or recklessly without knowledge, and acted on by the opposite party, or if made by mistake and innocently, and acted upon by the opposite party, constitutes legal fraud." Civ. Code 1895, § 4026. *Walters v. Eaves*, 105 Ga. 584, 32 S. E. 609. In Michigan, the doctrine is stated to be established "that if there was in fact a misrepresentation, though made innocently, and its deceptive influence was effective, the consequences to the plaintiff being as serious as though it had proceeded from a vicious purpose, he would have a right of action for the damages caused thereby, either at law or in equity." *Holcomb v. Noble*, 69 Mich. 396, 399, 37 N. W. 497; *Busch v. Wilcox*, 82 Mich. 315, 46 N. W. 940. In North Carolina, it is the duty of directors to know the truth of corporate reports. Hence it is unnecessary to establish that such reports were known to be false. *Houston v. Thornton*, 122 N. C. 365, 29 S. E. 827, 65 Am. St. Rep. 699; *Solomon v. Bates*, 118 N. C. 311, 321, 24 S. E. 478, 746, 54 Am. St. Rep. 725. In Wisconsin, it has been held that "if the representations were material and false, and the defendant knew, or had the means of knowing, or ought to have known, that they were untrue, and the plaintiff did not know, or have the present means of knowing, that they were false, and relied upon them as being true, and suffered damage thereby, it is immaterial whether the defendant made the representations willfully or intentionally or not; for he had no right to make even a mistake in facts so material to the contract, except under the penalty of responding in damages, and in the application of this principle, there is no difference between actions at law for damages and suits in equity to rescind or set aside the contract." *Cotzhausen v. Simon*, 47 Wis. 103, 106, 1 N. W. 473, per Orton, J.; *Montreal River Lumber Co. v. Mills*, 80 Wis. 540, 50 N. W. 507.

⁸⁵ "When a false statement has been made," says Lord Herschell (*DERRY v. PEEK*, supra, 14 App. Cas. at page 375, Chapin Cas. Torts, 223), the questions whether there were reasonable grounds for believing it, and what were the means of knowledge in the possession of the person making it, are most weighty matters for consideration. The ground upon which an alleged belief was founded is a most important test of its reality. I can conceive many cases where the fact that an alleged belief was destitute of all reasonable foundation would suffice of itself to convince the court that it was not really entertained, and that the representation was a fraudulent one. So, too, although means of knowledge are * * * a very different

honest belief will protect, there is an exception in cases where one has undertaken to act for another, though lacking authority to do so. He will be liable to the person misled, despite his sincere belief in the existence of the power.⁸⁶

Again, to the three cases put by Lord Herschell in *Derry v. Peek*, there must be added a fourth, namely, where the defendant has asserted or conveyed the impression that he has actual knowledge of the truth of the statement made, although conscious that he has no such knowledge, provided the matter is not merely one of opinion, estimate, or judgment, but is susceptible of actual knowledge.⁸⁷

thing from knowledge, if I thought that a person making a false statement had shut his eyes to the facts, or purposely abstained from inquiring into them, I should hold that honest belief was absent, and that he was just as fraudulent as if he had knowingly stated that which was false." To the same effect, *Gordon v. Irvine*, 105 Ga. 144, 31 S. E. 151; *French v. Vining*, 102 Mass. 132, 3 Am. Rep. 440. Cf. *Downey v. Finucane*, 205 N. Y. 251, 98 N. E. 391, 40 L. R. A. (N. S.) 307. So "to eliminate the possible infirmative hypothesis that the act in question was done innocently, or was the result of an accident or honest mistake, it may be shown that the perpetrator of the act had committed similar acts; i. e., frauds of a like nature." *Chamberlayne on Evidence*, vol. IV, § 3223.

⁸⁶ *Groeltz v. Armstrong*, 125 Iowa, 39, 99 N. W. 128; *Jefts v. York*, 10 Cush. (Mass.) 392; *People's Nat. Bank of Boston v. Dixwell*, 217 Mass. 436, 105 N. E. 435, Ann. Cas. 1915D, 722; *Kroeger v. Pitcairn*, 101 Pa. 311, 47 Am. Rep. 718. Cf. *Gilmore v. Bradford*, 82 Me. 547, 20 Atl. 92. In some states, however, the agent's liability is held to rest upon his implied contract of warranty or promise that he possessed the authority he assumed to exercise. *Taylor v. Nostrand*, 134 N. Y. 108, 31 N. E. 246; *Simmons v. More*, 100 N. Y. 140, 2 N. E. 640; *Baltzen v. Nicolay*, 53 N. Y. 467; *Farmers' Co-op. Trust Co. v. Floyd*, 47 Ohio St. 525, 26 N. E. 110, 12 L. R. A. 346, 21 Am. St. Rep. 846.

⁸⁷ "There can be no variance in the principle upon which one is held liable for damage who asserts the existence of a fact, knowing that in truth it does not exist, and that upon which a like responsibility is visited upon one who, conscious that he is ignorant concerning the subject-matter of which he speaks, still falsely asserts that, within his own personal knowledge, a fact stated by him does in truth exist." *Riley v. Bell*, 120 Iowa, 618, 626, 95 N. W. 170, per Bishop, C. J. To the same effect, *Braley v. Powers*, 92 Me. 203, 42 Atl. 362; *Chatham Furnace Co. v. Moffatt*, 147 Mass. 403, 18 N. E. 168, 9 Am. St. Rep. 727; *Hadcock v. Osmer*, 153 N. Y. 604, 47 N. E. 923; *Cabot v. Christie*, 42 Vt. 121, 1 Am. Rep. 313.

Analyzing these four cases, it will be observed that in the first there is a knowingly false assertion as to the fact itself; in the second, as to a belief in the fact. The third, though treated as distinct, "is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states."⁸⁸ In the fourth, the conscious false assertion is as to the asserter's knowledge of the fact.⁸⁹ Here honest belief in the existence of the fact as to which knowledge is asserted will be no defense,⁹⁰ nor will it be enough that defendant has exercised due diligence to ascertain the truth.⁹¹ But this doctrine can, of course, have no application, where the statement is not an unqualified assertion, but purports to be upon information and belief, and is made by one who believes in its truth.⁹² Again, the distinction must be emphasized between cases where the representation was made with respect to a specific fact susceptible of exact knowledge, so that an affirmation of knowledge may be taken in its strict sense, and not merely as a strong expression of belief and cases where the representation concerned a condition of affairs not susceptible of exact knowledge,⁹³ as in *Haycraft v. Creasy*.⁹⁴ If the representation is

⁸⁸ *DERRY v. PEEK*, *supra*, 14 App. Cas. at page 374, *Chapin Cas. Torts*, 223, per Lord Herschell.

⁸⁹ *Humphrey v. Merriam*, 32 Minn. 197, 198, 20 N. W. 138; *Spead v. Tomlinson*, 73 N. H. 46, 59 Atl. 376, 68 L. R. A. 432.

⁹⁰ *Smith v. Packard & Co.* (1911) 152 Iowa, 1, 130 N. W. 1076; *Litchfield v. Hutchinson*, 117 Mass. 195; *Fisher v. Mellen*, 103 Mass. 503; *Bullitt v. Farrar*, 42 Minn. 8, 43 N. W. 566, 6 L. R. A. 149, 18 Am. St. Rep. 485; *Hadcock v. Osmer*, 153 N. Y. 604, 47 N. E. 923; *Johnson v. Cate*, 75 Vt. 100, 53 Atl. 329.

⁹¹ *Huntress v. Blodgett*, 206 Mass. 318, 92 N. E. 427. Contra, where defendant is not conscious that he has no knowledge. *Powell v. F. C. Linde Co.*, 58 App. Div. 261, 68 N. Y. Supp. 1070, affirmed 171 N. Y. 675, 64 N. E. 1125.

⁹² *Davidson v. Jordan*, 47 Cal. 351; *Stevens v. Allen*, 51 Kan. 144, 32 Pac. 922; *Cooper v. Lovering*, 106 Mass. 77; *Moore v. Scott*, 47 Neb. 346, 66 N. W. 441.

⁹³ *Page v. Bent*, 2 Metc. (Mass.) 371; *Spead v. Tomlinson*, 73 N. H. 46, 59 Atl. 376, 68 L. R. A. 432; *Kimber v. Young*, 137 Fed. 744, 70 C. C. A. 178. Cf. *Board of Water Com'rs of City of New London v. Robbins*, 82 Conn. 623, 74 Atl. 938.

⁹⁴ 2 East, 92. Here the words were: "I can positively assure you

to be regarded as of opinion only, the question resolves itself into one of good faith. Did the defendant honestly believe such representation to be true? ⁹⁵

(6) *Damage*

If plaintiff can establish no damage, he will be denied recovery,⁹⁶ for, in the words of Croke, J., "fraud without damage, or damage without fraud, gives no cause of action; but, where these two do concur and meet together, there an action lieth."⁹⁷ For example, an action will not lie by one

of my own knowledge that you may credit Miss Robertson to any amount with perfect safety." These were held to import nothing more than a strong belief. But it is submitted that defendant misstated a fact, and did not merely utter a strong expression of opinion, when on another occasion he said: "I know of my own knowledge that she has been left a considerable fortune lately by her mother, and that she is in daily expectation of a much greater at the death of her grandfather, who has been bedridden a considerable time." Apparently this was not considered. In accord with *Haycraft v. Creasy*, *Cowley v. Smyth*, 46 N. J. Law, 380, 50 Am. Rep. 432, cf. *Sylvester v. Henrich*, 93 Iowa, 489, 61 N. W. 942. A contrary conclusion was reached by the New York Court of Appeals, where defendant's language was: "The Browns are good for what money you let them have." *Hadcock v. Osmer*, 153 N. Y. 604, 47 N. E. 923. In accord, *Crane v. Elder*, 48 Kan. 259, 29 Pac. 151, 15 L. R. A. 795. Cf. *Simons v. Cissna* (1909) 52 Wash. 115, 100 Pac. 200.

⁹⁵ To exculpate himself, he may resort to evidence not admissible in actions where the fraud is of a different nature. "He may, as in *Haycraft v. Creasy*, give evidence that the person whose ability he affirmed lived in a style and with such appearances of property and means as gave assurances of affluence. He may give in evidence the information he had upon the subject, and show the general reputation for trustworthiness of the person whose credit he affirmed. In line, he may avail himself of any evidence which may tend to show good faith or probable grounds for his belief." *Cowley v. Smyth*, 46 N. J. Law, 380, 389, 50 Am. Rep. 432, per Depue, J. In accord, *Baker v. Trotter*, 73 Ala. 277; *Clausen v. Tjernagel*, 91 Iowa, 285, 59 N. W. 277. Cf. *Duryea v. Zimmerman*, 121 App. Div. 560, 106 N. Y. Supp. 237.

⁹⁶ *Woodson v. Winchester* (1911) 16 Cal. App. 472, 117 Pac. 565; *Bailey v. Oatis* (1911) 85 Kan. 339, 119 Pac. 830; *Danforth v. Cushing*, 77 Me. 182; *Kuper v. Snethen* (1914) 96 Neb. 34, 146 N. W. 991; *URTZ v. NEW YORK CENT. & H. R. R. CO.*, 202 N. Y. 170, 95 N. E. 711, *Chapin Cas. Torts*, 230; *Farwell v. Colonial Trust Co.*, 147 Fed. 480, 78 C. C. A. 22.

⁹⁷ *Bally v. Merrell*, 3 Bulstr. 94, 95. And see *supra*, p. 73.

who has been fraudulently induced to indorse a note which is still outstanding,⁹⁸ or by one so induced to pay a debt which he was bound to pay in any event.⁹⁹ The damage must likewise be the proximate result of the deception.¹⁰⁰ At times, the method of computation will present a question of some difficulty. Take, for example, the case of a sale induced by defendant's fraud. Where vendee sues vendor, it has been held that the damages are usually to be measured by the difference between the actual or market value of the thing sold and the price paid therefor.¹⁰¹ But authority and reason would seem to sanction the award of an indemnity not limited by the consideration received. Hence it is preferable to allow the difference between actual value and what the value would have been, had the representations been true.¹⁰² The purchaser "has a right to make a good bargain if he can, provided only that he deals honestly. Often the profit secured above the price paid is the sole motive for the purchase. * * * To the entire benefit of his bargain he is entitled. If there had been no fraud, he

⁹⁸ *Freeman v. Venner*, 120 Mass. 424. But see *Hoffman v. Toft* (1914) 70 Or. 488, 142 Pac. 365, 52 L. R. A. (N. S.) 944. But an action in equity will lie to restrain the negotiation of promissory notes, and to cancel such notes when they are obtained by fraud and the present holders are not in due course. *Warnock Uniform Co. v. Garifalos*, 170 App. Div. 674, 156 N. Y. Supp. 637.

⁹⁹ *Musconetcong Iron Works v. Delaware, L. & W. R. Co.* (1910) 78 N. J. Law, 717, 76 Atl. 971, 20 Ann. Cas. 178.

¹⁰⁰ *Jamison v. Ellsworth*, 115 Iowa, 90, 87 N. W. 723; *Vilett v. Moler*, 82 Minn. 12, 84 N. W. 452; *Byard v. Holmes*, 34 N. J. Law, 296; *Morgan v. Hodge*, 145 Wls. 143, 129 N. W. 1083; *Richardson v. Dunn*, 8 C. B. N. S. 655.

¹⁰¹ *Holmes v. Rivers*, 145 Iowa, 702, 124 N. W. 801; *Freeman v. F. P. Harbaugh Co.*, 114 Minn. 283, 130 N. W. 1110. Cf. *Duffy v. McKenna* (1912) 82 N. J. Law, 62, 81 Atl. 1101; *Crater v. Binninger*, 33 N. J. Law, 513, 97 Am. Dec. 737n; *Van de Wiele v. Garbade* (1912) 60 Or. 585, 120 Pac. 752; *Smith v. Bolles*, 132 U. S. 125, 10 Sup. Ct. 39, 33 L. Ed. 279; *Chandler v. Andrews*, 192 Fed. 543, 113 C. C. A. 15.

¹⁰² *Nysewander v. Lowman*, 124 Ind. 584, 24 N. E. 355; *Thomson v. Pentecost*, 210 Mass. 223, 96 N. E. 335; *Adams v. Barber* (1911) 157 Mo. App. 370, 139 S. W. 489; *Benedict v. Guardian Trust Co.*, 91 App. Div. 103, 86 N. Y. Supp. 370; *R. A. Elder & Co. v. Shoffstall*, (1914) 90 Ohio St. 265, 107 N. E. 539.

would have had it; he should not lose it because the other party has been dishonest." ¹⁰³

There would seem no reason why this rule should not be applied where vendor sues vendee.¹⁰⁴ But it would appear that the contrary doctrine has received stronger support.¹⁰⁵

It is impossible, within the compass of this work, to discuss at length the measure of redress which will be accorded. Each case must largely be a law unto itself. By the weight of authority, exemplary damages are not prohibited.¹⁰⁶

¹⁰³ *Krumm v. Beach*, 96 N. Y. 398, 407, per Finch, J. So, where one joint purchaser is induced to pay the represented price for property which he subsequently ascertains is more than that in fact paid, he should recover the difference between what he in fact paid and what he should have paid of the true price. It is immaterial that the property was in fact worth more than the true price, or as much or more than the represented price. He is entitled to the profit of his bargain. *Lowe v. Hendrick*, 86 Conn. 481, 85 Atl. 795; *Thorp v. Hough* (1913) 160 Iowa, 694, 142 N. W. 201; *Douglass v. Richards*, 116 App. Div. 27, 101 N. Y. Supp. 299; *Bergeron v. Miles*, 88 Wis. 397, 60 N. W. 783, 43 Am. St. Rep. 911.

¹⁰⁴ *Hicks v. Deemer*, 187 Ill. 164, 58 N. E. 252; *Potter v. Necedah Lumber Co.*, 105 Wis. 25, 80 N. W. 88, 81 N. W. 118. Cf. *Boddy v. Henry*, 113 Iowa, 462, 85 N. W. 771, 53 L. R. A. 769.

¹⁰⁵ *McDonough v. Williams*, 77 Ark. 261, 92 S. W. 783, 8 L. R. A. (N. S.) 452, 7 Ann. Cas. 276; *Vivian v. Allen* (1897) 9 Colo. App. 147, 47 Pac. 844; *Ranch v. Lynch* (1913) 4 Boyce (Del.) 446, 89 Atl. 134; *McMillan v. Reaume* (1904) 137 Mich. 1, 100 N. W. 166, 109 Am. St. Rep. 666; *Mountain v. Day*, 91 Minn. 249, 97 N. W. 883.

¹⁰⁶ *Kearney v. Davin*, 162 Ill. App. 37; *McAroy v. Wright*, 25 Ind. 22; *KUJEK v. GOLDMAN*, 150 N. Y. 176, 44 N. E. 773, 34 L. R. A. 156, 55 Am. St. Rep. 670, Chapin Cas. Torts, 16; *Nye v. Merriam*, 35 Vt. 438. Contra, *Singleton's Adm'r v. Kennedy* (Ky.) 9 B. Mon. 222; *Hoffman v. Gill*, 102 Mo. App. 320, 77 S. W. 146.

CHAPTER XV

INFRINGEMENT OF PRIVATE PROPERTY (CONTINUED)—
SLANDER OF TITLE

89. Definition.

90. Elements.

DEFINED

89. Under this head will be considered the disparagement of title or quality of lands and goods.

Though the term "slander of title" is well established, it is largely a mere figure of speech.¹ It directs attention to the fact that there is here an assault, not upon the reputation of the individual, but upon the extent or value of a property right. But it is nevertheless misleading. In the first place, the action is not one of defamation, but is in the nature of trespass on the case for the special damages sustained.² Second, it is not essential that there be oral defamation. "The fact that the publication is written or printed, and not oral, makes no difference in the ground of the action, and goes only to the question of dissemination, and consequent damage."³ Third, the wrong, it is true, may consist of an assault upon plaintiff's title,⁴ but it is not limited thereto. There may be a disparagement of quality, as if it should be asserted that a horse was aged,⁵

¹ See *Kendall v. Stone*, 5 N. Y. 14, 18.

² *Wilson v. Dubois*, 35 Minn. 471, 29 N. W. 68, 59 Am. Rep. 335; *Meyrose v. Adams*, 12 Mo. App. 329; *Hatchard v. Mége*, 56 L. J. Q. B. 397; *Malachy v. Soper*, 3 Bing. N. C. 371, 2 Hodges, 217, 6 L. J. C. P. 32, 3 Scott, 725, 32 E. C. L. 176.

³ *Meyrose v. Adams*, 12 Mo. App. 329, 332, per Bakewell, J. Cf. *Chesebro v. Powers*, 78 Mich. 472, 44 N. W. 290.

⁴ *Hill v. Ward*, 13 Ala. 310; *Chesebro v. Powers*, 78 Mich. 472, 44 N. W. 290; *Long v. Rucker*, 166 Mo. App. 572, 149 S. W. 1051; *Dodge v. Colby*, 108 N. Y. 445, 15 N. E. 703.

⁵ *Wilson v. Dubois*, 35 Minn. 471, 29 N. W. 68, 59 Am. Rep. 335.

that the ore of a mine would suddenly run out,⁶ or that a dinner furnished by a caterer on a public occasion was "wretched," and was served "in such a way that even hungry barbarians might justly object," that "the cigars were simply vile, and the wines not much better."⁷ It should be noted, however, that although assertions of inferiority are no doubt disparaging, yet a certain leeway must be allowed to trade rivalry. Hence it is not actionable merely to assert that one's goods are better than those of a competitor. Were it otherwise, as Lord Chancellor Herschell remarked, "the courts of law would be turned into a machinery for advertising rival productions by obtaining a judicial determination which of the two was the better."⁸ But competition will not excuse the charge of a positive defect.⁹

ELEMENTS

90. Publication, is, of course, essential. In addition, plaintiff must aver and establish (a) the falsity of the charge; (b) the sustaining of a special damage, proximately resulting; and (c) under certain circumstances, malice.¹⁰

⁶ *Paull v. Halferty*, 63 Pa. 46, 3 Am. Rep. 518.

⁷ *DOOLING v. BUDGET PUB. CO.*, 144 Mass. 258, 10 N. E. 809, 59 Am. Rep. 83, Chapin Cas. Torts, 235. For further illustrations, see *Kennedy v. Press Pub. Co.*, 41 Hun (N. Y.) 422; *Cleveland Leader Printing Co. v. Nethersole*, 84 Ohio St. 118, 95 N. E. 735, Ann. Cas. 1912B, 978; *Lyne v. Nichols*, 23 T. L. R. 86.

⁸ *White v. Mellin*, [1895] App. Cas. 154, 165.

⁹ "Thus, if A. simply says, 'My soothing syrup is better than B.'s,' this statement is not actionable, although it is not true, and A. knew it was not. But, suppose A. says, 'My syrup is better than B.'s syrup, because there is opium in B.'s syrup.' If there is in fact no opium in B.'s syrup, and damage follows upon this statement, then A. is at least *prima facie* liable." "Disparagement of Property," by Jeremiah Smith, 13 Columbia Law Rev. 133.

¹⁰ *Burkett v. Griffith*, 90 Cal. 532, 537, 27 Pac. 527, 13 L. R. A. 707, 25 Am. St. Rep. 151; *Meyrose v. Adams*, 12 Mo. App. 329, 332; *Cardon v. McConnell*, 120 N. C. 461, 27 S. E. 109; *Le Massena v. Storm*, 62 App. Div. 150, 154, 70 N. Y. Supp. 882; *Like v. McKinstry*, 41 Barb. (N. Y.) 186, 190; *Potosi Zinc Co. v. Mahoney* (1913) 36 Nev. 390, 135

(a) Falsity

Plaintiff has the burden of proving the falsity of the charge, in which respect this action differs from personal defamation, where falsity is presumed, and where the burden of establishing truth rests upon a justifying defendant.¹¹

(b) Damage Proximately Resulting

Special damage must also be "distinctly and precisely set out in the declaration and established by the proof."¹² Hence mere general allegations of loss of custom or sales will not be enough.¹³ There should be averment and proof of a loss of sale to some particular person.¹⁴ Recovery has been denied where defendants' act has caused the third party to break a contract made with plaintiff. If the latter has consented to the breach and canceled the agreement, he has himself brought about the loss.¹⁵ If he has

Pac. 1078. "If some portions of the statement which a person makes are *bona fide*, but others are *mala fide*, and occasion injury to another, the injured party cannot recover damages, unless he can distinctly trace the damage as resulting from that part which is made *mala fide*." *Brook v. Rawl*, 4 Exch. 521, 524, per Parke, B.

¹¹ *Fant v. Sullivan* (Tex. Civ. App. 1912) 152 S. W. 515; *Burnett v. Tak*, 45 L. T. 743. And see *Pater v. Baker*, 3 O. B. 831, 869; *Steward v. Young*, L. R. 5 C. P. 122, 127.

¹² *Swan v. Tappan*, 5 Cush. (Mass.) 104, 109. To the same effect, *Ebersole v. Fields* (1913) 181 Ala. 421, 62 South. 73; *Stark v. Chitwood*, 5 Kan. 141; *Cleveland Leader Printing Co. v. Nethersole*, 84 Ohio St. 118, 95 N. E. 735, Ann. Cas. 1912B, 978; *McGuinness v. Hargiss*, 56 Wash. 162, 105 Pac. 233, 21 Ann. Cas. 220; *Malachy v. Soper*, 32 E. C. L. 176.

¹³ *Marlin Firearms Co. v. Shields*, 171 N. Y. 384, 64 N. E. 163, 59 L. R. A. 310; *Tobias v. Harland*, 4 Wend. (N. Y.) 537.

¹⁴ "The rule is not technical, but substantial. It imposes no hardship upon the plaintiff. If there is a person to whom a sale could have been made in the absence of the disparagement, he can be named, so as to inform defendant of the particular charge of damage which he is required to meet. If there is no such person, there is no cause of action." *Wilson v. Dubois*, 35 Minn. 471, 473, 29 N. W. 68, 59 Am. Rep. 335, per Berry, J. To the same effect, *Stevenson v. Love* (C. C.) 106 Fed. 466; *Tasburgh v. Day*, Cro. Jac. 484; *Manning v. Avery*, 3 Keb. 153.

¹⁵ *Kendall v. Stone*, 5 N. Y. 14.

not consented, then he has a perfect remedy against the third party.¹⁶ But it would seem illogical to deny recovery in the latter case. If A.'s wrongful act is the foreseeable consequence, and therefore the proximate result, of the wrongful act of B., surely the injured party should not be refused redress against the latter. Why should B. be permitted to escape liability merely because there happens to exist a cause of action against another?

(c) *Malice*

Though malice is usually said to be an essential ingredient, yet as a learned author¹⁷ has pointed out, where there has been disparagement of title, a distinction must be drawn between actions against strangers and against rival claimants. If by "malice" is meant "malice in fact," it really forms no part of plaintiff's case when defendant is a stranger. Here the conclusion that a wrongful act, done without just cause or excuse, was prompted by an improper motive, i. e., "malice in law," may well be drawn. Though defendant may in fact have acted honestly, he has none the less caused loss to an innocent party, which the latter should not be compelled to bear. On the other hand, if the defendant is a rival claimant, he occupies a position somewhat analogous to that of one charged with defamation uttered on an occasion conditionally privileged. Here bad motive should not be presumed merely because he has made an unfounded claim. "Malice in fact" should be established. Not only has one the right to assert what he believes to be his title, but it may even be his duty to do so, where a sale is in contemplation, in order that innocent purchasers may not be misled; and though a sale be thereby prevented, his assertion will give rise to no cause of action, unless it is "bottomed on fraud."¹⁸ Plaintiff

¹⁶ *Burkett v. Griffith*, 90 Cal. 532, 27 Pac. 527, 13 L. R. A. 707, 25 Am. St. Rep. 151; *Felt v. Germania Life Ins. Co.*, 149 App. Div. 14, 133 N. Y. Supp. 519; *Cohen v. Minzesheimer* (Sup.) 118 N. Y. Supp. 385. Cf. *Walkley v. Bostwick*, 49 Mich. 374, 13 N. W. 780.

¹⁷ *Jeremiah Smith*, "Disparagement of Property," 13 Columbia Law Rev. 13, 19.

¹⁸ *Cardon v. McConnell*, 120 N. C. 461, 463, 27 S. E. 109. To the

is not unduly burdened when he is required to prove that defendant could not honestly have believed in the existence of the right claimed. Even where there appears no reasonable or probable cause for the belief, still, as the latter may have acted from mere stupidity, the jury are not bound to find malice, though they are at liberty to do so.¹⁹

Where quality is disparaged, there would seem no reason why defendant's bad faith must be shown by plaintiff. The position of a rival trader is not analogous to that of a claimant. If the latter remain silent, he may jeopardize his title; but the possible increase of a trader's sales, which may be brought about by spreading reports of the quality of a rival's goods, scarcely constitutes an interest worthy of protection.²⁰ *A fortiori*, should a mere stranger be forced to make good the damage he has caused, irrespective of the motive which prompted him.

same effect, *Hill v. Ward*, 13 Ala. 310; *Duncan v. Griswold*, 92 Ky. 546, 18 S. W. 354; *Harriss v. Sneed*, 101 N. C. 273, 7 S. E. 801; *Smith v. Spooner*, 3 Taunt. 246. Cf. *Hovey v. Rubber Tip Pencil Co.*, 57 N. Y. 119, 15 Am. Rep. 470.

¹⁹ *Harrison v. Howe*, 109 Mich. 476, 67 N. W. 527; *Butts v. Long*, 106 Mo. App. 313, 80 S. W. 312; *Hopkins v. Drowne*, 21 R. I. 20, 41 Atl. 567; *Pitt v. Donovan*, 1 M. & S. 639. Cf. *Gent v. Lynch*, 23 Md. 58, 87 Am. Dec. 558, note.

²⁰ Cf. *Western Counties Manure Co. v. Lawes Chemical Manure Co.*, L. R. 9 Exch. 218.

CHAPTER XVI

INFRINGEMENT OF PRIVATE PROPERTY (CONTINUED)—INTERFERENCE WITH CONTRACTUAL RIGHTS

- 91. (I) Prospective Contracts of Employment.
- 92. (II) Prospective Contracts Not of Employment.
- 93. (III) Existing Contracts of Employment.
- 94. (IV) Existing Contracts Not of Employment.

SCOPE OF CHAPTER

We shall here consider whether A will have a cause of action against C under the following conditions:

First: Owing to C's interference, B did not enter into a contract with A (I) of employment (II) not of employment.

Second: Owing to C's interference, B broke an existing contract with A. The contract was (III) one of employment (IV) not one of employment.

It will be necessary to distinguish between cases where the interference was (a) malicious and (b) non-malicious and where unlawful means (c) were and (d) were not used.

The question whether a cause of action will arise out of an interference with contractual rights is one of extreme difficulty.¹ This is largely due to the fact that it cannot be

¹ The following may profitably be consulted: "The Tubwomen v. The Brewers of London" by William A. Purrington, 3 Columbia Law Rev. 447; "The Boycott and Kindred Practices as Ground for Damages" by John H. Wigmore, 21 Am. Law Rev. 509; "Interference with Social Relations" by John H. Wigmore, 21 Am. Law Rev. 764; "Privilege, Malice, and Intent" by Justice Holmes, 8 Harv. Law Rev. 1; "Combination by Coercion" 17 Harv. Law Rev. 558; "Interference with Contracts and Business in New York" by E. W. Huffcut, 18 Harv. Law Rev. 423; "The Closed Market, the Union Shop, and the Common Law" by Wm. Draper Lewis, 18 Harv. Law Rev. 444; "Crucial Issues in Labor Litigation" by Jeremiah Smith, 20 Harv. Law Rev. 253, 345, 429; "Predatory Price Cutting as Unfair

answered solely through legal reasoning for it must likewise be viewed from the standpoint of sociology and economics. "The true grounds of decision are considerations of policy and of social advantage and it is vain to suppose that solutions can be attained merely by logic and the general propositions of law which nobody disputes."² In many respects, the law is still in process of evolution. Naturally there has been great divergence in views. While it is believed that a fairly clear rule may be worked out, yet it must be confessed that the decisions hereafter cited, are in the main, decidedly unsatisfactory. Owing to the indefinite phraseology frequently employed and the vast amount of dicta that has crept in, the cases upon disputed points require close analysis.³

Strictly speaking, the term "contractual rights" means rights secured by existing contracts but in its larger aspect, it may include rights *to contract*. Since, however, a distinction has been drawn between them, and between contracts actual and prospective, of employment and not of employment, separate treatment becomes necessary.⁴

Trade" by E. S. Rogers, 27 Harv. Law Rev. 139; "Comments on the Modern Law of Unfair Trade" by E. S. Rogers, 3 Ill. Law Rev. 551; "The Authority of *Allen v. Flood*" by H. L. Willgus, 1 Mich. Law Rev. 28; "Labor Organizations in Legislation" by Jerome C. Knowlton, 6 Mich. Law Rev. 609.

² *Vegelahn v. Guntner*, 167 Mass. 92, 106, 44 N. E. 1077, 35 L. R. A. 722, 57 Am. St. Rep. 443, per Holmes, J.

³ This forces a writer to elect whether he will convert his work into a mere digest or risk the charge that his cited authorities fail to sustain the propositions for which they are advanced.

⁴ It has been deemed advisable to include under the head of interference with contractual rights, many cases which are usually grouped under conspiracy, boycott, unfair competition, and kindred titles. The reason is that they are, after all, only illustrations of a few underlying principles. The question presented in every instance is how far the law will afford redress against interference with (1) contracts not in existence and (2) existing contracts. When analyzed, the so-called unfair competition and boycott cases will be seen to fall under one or both of these heads. If goods are sold in packages resembling those in which an established product is put up, or if a trade name is adopted so similar as to be calculated to deceive, it is evident that this falls under the first head. The label or name

91. (I) PROSPECTIVE CONTRACTS OF EMPLOYMENT

At the outset, it will be advisable to see just what right may be infringed. It was well said in *Brennan v. United Hatters*⁵ that "as a part of the right of acquiring property there resides in every man the right of making contracts for the purchase and sale of property, and contracts for personal services, which amount to the purchase and sale of labor. It makes little difference whether the right that underlies contracts of the latter sort is called a personal right or a property right. It seems to us impossible to draw a distinction between a right of property and a right of acquiring property that will make a disturbance of the latter right any less actionable than a disturbance of the former. In a civilized community which recognizes the right of private property among its institutions, the notion is intolerable that a man should be protected by the law in the enjoyment of property once it is acquired, but left unprotected by the law in his effort to acquire it."⁶ There may therefore be a cause of action for depriving a man of custom, that is of possible contracts.⁷

is merely a means by which the wrongdoer has succeeded in inducing customers not to enter into contractual relations with his competitor. If a labor union threaten to strike unless a non-union employé is discharged, it would appear that this is only a method of procuring the breach of an existing contract. To treat the first under unfair competition and the second under strikes, boycotts or labor unions seems tantamount to ignoring a very close kinship. See the author's article in 38 Cyc. 501 et seq.

⁵ 73 N. J. Law, 729, 742, 65 Atl. 165, 9 L. R. A. (N. S.) 254, 118 Am. St. Rep. 727, 9 Ann. Cas. 698.

⁶ While this was said in exposition of a constitutional provision asserting the existence of the natural and inalienable right of "acquiring" property, it is quoted as embodying a principle which is manifestly self sustaining.

⁷ *May v. Wood*, 172 Mass. 11, 14, 51 N. E. 191, per Holmes, J., dissenting. "The next point is, whether the distinction taken for the defendants between the claim for inducing persons to break contracts already entered into with the plaintiff and that for inducing persons not to enter into contracts with the plaintiff can be sus-

But is this true of every interference even though the methods used are lawful? Suppose C. merely persuaded B. not to employ A.? There would seem, says a learned author, no cause of action here. The question is one of policy and "the harm likely to be caused by persuasion to refrain from contracting does not appear to be so great as to make it expedient to interfere with the liberty of speech in this respect."⁸ Suppose, however, that an inducement is offered consisting (a) of money or other tangible object of property or (b) an offer to exercise or a threat to refrain from exercising a right to employ, work for or deal with. Competition apart, the first would appear actionable. "A threat of pecuniary loss, or an offer of pecuniary gain, differs materially from simple persuasion." It is more likely to be effective. If such threats or offers can be indulged in with impunity, there is hardly any limit to the damage, which a rich or powerful man can safely cause to his weaker neighbors.⁹ With respect to the second case, while if there is no contract breached, there can, of course, be no liability to the party threatened with a severance of existing or prospective relations, nevertheless, can one annex a condition, the effect of which will be to injure third parties? If he "cannot use his tangible property as an instrument of causing desired harm * * * without any other justification than the abstract right to do as he pleases

tained and whether the latter claim is maintainable in law. I do not think that distinction can prevail. There was the same wrongful intent in both cases, wrongful because malicious. There was the same kind of injury to the plaintiff. It seems rather a fine distinction to say that where a defendant maliciously induces a person not to carry out a contract already made with the plaintiff and so injures the plaintiff, it is actionable, but where he injures the plaintiff by maliciously preventing a person from entering into a contract with the plaintiff which he would otherwise have entered into, it is not actionable." *Temperton v. Russell* (1893) L. R. 1 Q. B. 715, 728, 57 J. P. 676, 62 L. J. Q. B. 412, 69 L. T. Rep. N. S. 78, 4 Reports, 376, 41 Wkly. Rep. 565, per Esher, M. R.

⁸ "Crucial Issues in Labor Litigation," by Jeremiah Smith, 20 Harv. Law Rev. 266. But see *Huskie v. Griffin*, 75 N. H. 345, 74 Atl. 595, 27 L. R. A. (N. S.) 966, 139 Am. St. Rep. 718.

⁹ 20 Harv. Law Rev. 268.

with his own, can he so use his personal rights"?¹⁰ It would seem in this case likewise that A. might recover for damages which C. aimed to cause.¹¹

Instances of individual interference with prospective contracts of employment are exceedingly rare.¹² We cannot well include cases where the employment, terminable at will, would have continued indefinitely,¹³ since there is here an interference with an established status.¹⁴ Usually the interference is the concerted act of many,¹⁵ and occurs in the course of a labor dispute. Here the trade union endeavors to prevent the employer from securing labor or rival labor from obtaining employment. Its weapons are usually the strike and boycott. The employer retaliates with the lockout. Both sides use the blacklist.

It is almost a truism that in no branch of the law have there been greater changes than in that dealing with the relations of capital and labor. As late as 1835 the Supreme Court of New York sustained an indictment against workmen for conspiracy to raise the rate of wages,¹⁶ as it had done in 1810.¹⁷ By a series of English statutes run-

¹⁰ 20 Harv. Law Rev. 269.

¹¹ See *Jones v. Leslie*, 61 Wash. 107, 112 Pac. 81, 48 L. R. A. (N. S.) 893, Ann. Cas. 1912B, 1158.

¹² "The plain reason being that peaceful and truthful persuasion or promise of future favor by a single individual is not likely to produce results of a character so grave as to induce the injured party to seek redress through the courts." *Huskie v. Griffin*, 75 N. H. 345, 349, 74 Atl. 595, 27 L. R. A. (N. S.) 966, 139 Am. St. Rep. 718.

¹³ Such as *Gibson v. Fidelity & Casualty Co.*, 232 Ill. 49, 83 N. E. 539; *London Guarantee & Accident Co. v. Horn*, 206 Ill. 493, 69 N. E. 526, 99 Am. St. Rep. 185.

¹⁴ See *infra*, pp. 444, 446.

¹⁵ As hereafter stated, it then becomes proper to take note of defendants' purpose. *Willis v. Muscogee Mfg. Co.*, 120 Ga. 597, 48 S. E. 177, 1 Ann. Cas. 472; *Vanarsdale v. Laverty*, 69 Pa. 103; *Iron Molders' Union v. Allis-Chalmers Co.*, 166 Fed. 45, 91 C. C. A. 631, 20 L. R. A. (N. S.) 315.

¹⁶ *People v. Fisher*, 14 Wend. (N. Y.) 9, 28 Am. Dec. 501.

¹⁷ *People v. Melvin*, 2 Wheeler, Cr. Cas. (N. Y.) 262. Both decisions were amply supported by adjudications of the English courts. *King v. Journeymen Tailors*, 8 Mod. 10. See "*The Tubwomen v. The*

ning down to the year 1800, heavy penalties were inflicted upon workmen for refusing or conspiring to refuse to labor.¹⁸ But social changes have worked corresponding alterations in the law.¹⁹ It is now well settled that where no breach of contract is involved, as the employer may hire or discharge as he sees fit,²⁰ so may the employé refuse or cease to work, whether it be for a good reason, a bad reason or no reason at all.²¹ From this springs the doctrine sometimes asserted that what one man may lawfully do may be done or threatened by many.²² But this ignores

Brewers of London," by William A. Purrington, 3 Columbia Law Rev. 447.

¹⁸ E. g. the two Statutes of Laborers, 23 Edw. III and 25 Edw. III, St. 1, passed in 1349 and 1350 (see *infra*, p. 444); 2 & 3 Edw. VI, c. 15 (1548); 5 Eliz. c. 4 (1562); 7 Geo. I, St. 1, c. 13 (1720); 40 Geo. III, c. 106 (1800).

¹⁹ See 34 & 35 Vict. c. 31; 38 & 39 Vict. c. 86; 39 & 40 Vict. c. 22; 6 Edw. VII, c. 47. For illustrations of American statutes, see 3 Comp St. N. Y. 1910, p. 3051, § 128; Penal Law N. Y. (Consol. Laws, c. 40) § 582; Act Cong. Oct. 15, 1914 (Clayton Act) c. 323, § 6, 38 Stat. 731.

²⁰ Thus statutes making it a criminal offense to discharge an employé simply because of his membership in a labor union or prohibiting the making of employment conditional upon an employé not becoming a member have been held unconstitutional. *Gillespie v. People*, 188 Ill. 176, 58 N. E. 1007, 52 L. R. A. 283, 80 Am. St. Rep. 176; *State ex rel. Smith v. Daniels*, 118 Minn. 155, 136 N. W. 584; *State v. Julow*, 129 Mo. 163, 31 S. W. 781, 29 L. R. A. 257, 50 Am. St. Rep. 443; *People v. Marcus*, 185 N. Y. 257, 77 N. E. 1073, 7 L. R. A. (N. S.) 282, 113 Am. St. Rep. 902, 7 Ann. Cas. 118; *Coppage v. State of Kansas*, 236 U. S. 1, 35 Sup. Ct. 240, 59 L. Ed. 441, L. R. A. 1915C, 960; *Adair v. United States*, 208 U. S. 161, 28 Sup. Ct. 277, 52 L. Ed. 436, 13 Ann. Cas. 76.

²¹ *Natl. Protective Ass'n v. Cumming*, 170 N. Y. 315, 63 N. E. 369, 58 L. R. A. 135, 88 Am. St. Rep. 648. Cf. *Com. v. Hunt*, 4 Metc. (Mass.) 111, 38 Am. Dec. 346.

²² *Parkinson Co. v. Building Trades Council*, 154 Cal. 581, 98 Pac. 1027, 21 L. R. A. (N. S.) 550, 16 Ann. Cas. 1165; *Kemp v. Division No. 241*, 255 Ill. 213, 223, 99 N. E. 389, Ann. Cas. 1913D, 347; *Lindsay & Co., L'td., v. Montana Federation of Labor*, 37 Mont. 264, 96 Pac. 127, 18 L. R. A. (N. S.) 707, 127 Am. St. Rep. 722; *Nat. Protective Ass'n v. Cumming*, 170 N. Y. 315, 63 N. E. 369, 58 L. R. A. 135, 88 Am. St. Rep. 648; *Mills v. United States Printing Co.*, 99 App. Div. 605, 91 N. Y. Supp. 185.

the coercive force of numbers.²³ The increase of power by combination is "in geometrical proportion to the number concerned."²⁴ "The force of a combination * * * is something more than the mere sum of the individualities that compose it."²⁵ "A grain of gunpowder is harmless, but a pound may be highly destructive."²⁶ True, all acts done in combination cannot always on this ground alone be deemed unlawful. But the greater power to harm cannot be ignored and inquiry will be justified into the motives of the actors. Malice, that much misunderstood term, is said to be the test of liability.²⁷ When analyzed this merely means that the object must not be an improper one.

Now the protection of one's legitimate interests is not an unlawful object, and a combination of workmen formed to secure an advance in wages, shorter hours, protection against incompetent co-workers or other similar objects is not illegal.²⁸ So it is lawful to insist that an entire job be given to members of the union and that a portion be not given to non-members.²⁹ On the other hand, it is equally

²³ Carried to its legitimate conclusion it will sanction a condition
*"Quand on conspire
 Quand sans frayer,
 On peut se dire conspirateur."*

²⁴ Com. ex rel. Chew v. Carlisle, Brightly, N. P. (Pa.) 36, 41.

²⁵ Eddy on Combinations, vol. I, § 475.

²⁶ Lord Brampton in Quinn v. Leathem, [1901] App. Cas. 495, 530.

²⁷ Willner v. Silverman, 109 Md. 341, 71 Atl. 962, 24 L. R. A. (N. S.) 895; Walker v. Cronin, 107 Mass. 555. Cf. Huskle v. Griffin, 75 N. H. 345, 74 Atl. 595, 27 L. R. A. (N. S.) 966, 139 Am. St. Rep. 718.

²⁸ See Com. v. Hunt, 4 Metc. (Mass.) 111, 38 Am. Dec. 346; Beck v. Railway Teamsters' Protective Union, 118 Mich. 497, 77 N. W. 13, 42 L. R. A. 407, 74 Am. St. Rep. 421; Jacobs v. Cohen, 183 N. Y. 207, 76 N. E. 5, 2 L. R. A. (N. S.) 292, 111 Am. St. Rep. 730, 5 Ann. Cas. 280; Natl. Protective Ass'n v. Cumming, supra; Longshore Printing Co. v. Howell, 26 Or. 527, 38 Pac. 547, 28 L. R. A. 464, 46 Am. St. Rep. 640; Everett Waddey Co. v. Richmond Typographical Union, 105 Va. 188, 53 S. E. 273, 5 L. R. A. (N. S.) 792, 8 Ann. Cas. 798.

²⁹ Pickett v. Walsh, 192 Mass. 572, 78 N. E. 753, 6 L. R. A. (N. S.) 1067, 116 Am. St. Rep. 272, 7 Ann. Cas. 638; Nat. Fireproofing Co. v. Mason Builders' Ass'n, 169 Fed. 259, 94 C. C. A. 535, 26 L. R. A. (N. S.) 148. Cf. Minasian v. Osborne, 210 Mass. 250, 96 N. E. 1036, 37 L. R. A. (N. S.) 179, Ann. Cas. 1912C, 1299; Mills v. United States Printing Co., 99 App. Div. 605, 91 N. Y. Supp. 185.

clear that a purpose which the law will not recognize as self-protective, cannot serve as an excuse.⁸⁰ For instance, the object is illegal if it is merely punitive as to prevent a non-union workman from securing employment,⁸¹ or to compel an employer to pay a fine imposed upon him by a union of which he was not a member,⁸² or to force the discharge of an unpopular foreman.⁸³ Another situation is where there has been a strike or threat to strike against A., with whom there is no dispute because A. works for B., with whom there is a dispute, for the purpose of forcing A. to force B. to yield. This passes beyond a case of competition. It is but fair to limit the right of coercion and compulsion to strikes against persons with whom there is a trade controversy.⁸⁴ Here an "outsider is brought in who would otherwise have remained neutral." If defendant can do this then "he can drag the whole community into the dispute."⁸⁵ This is analogous to what is sometimes termed a "sympathetic strike,"⁸⁶ which, it is submit-

⁸⁰ *Davis Machine Co. v. Robinson*, 41 Misc. Rep. 329, 84 N. Y. Supp. 839; *Erdman v. Mitchell*, 207 Pa. 79, 56 Atl. 327, 63 L. R. A. 534, 90 Am. St. Rep. 783; *Giblan v. Nat. Amalgamated Laborers' Union*, L. R. (1903) 2 Q. B. 600.

⁸¹ *Lucke v. Clothing Cutters' & Trimmers' Assembly*, 77 Md. 396, 26 Atl. 505, 19 L. R. A. 408, 39 Am. St. Rep. 421; *Hanson v. Innis*, 211 Mass. 301, 97 N. E. 756. But see *Allen v. Flood*, [1898] App. Cas. 1.

⁸² *March v. Bricklayers' & Plasterers' Union*, 79 Conn. 7, 63 Atl. 291, 4 L. R. A. (N. S.) 1198, 118 Am. St. Rep. 127, 6 Ann. Cas. 848; *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287. Cf. *Burke v. Fay*, 128 Mo. App. 690; 107 S. W. 408.

⁸³ *De Minico v. Craig*, 207 Mass. 593, 94 N. E. 317, 42 L. R. A. (N. S.) 1048.

⁸⁴ *Pickett v. Walsh*, 192 Mass. 572, 78 N. E. 753, 6 L. R. A. (N. S.) 1067, 116 Am. St. Rep. 272, 7 Ann. Cas. 638; *Lohse Patent Door Co. v. Fuelle*, 215 Mo. 421, 114 S. W. 997, 22 L. R. A. (N. S.) 607, 128 Am. St. Rep. 492. Cf. *Purington v. Hinchliff*, 219 Ill. 159, 76 N. E. 47, 2 L. R. A. (N. S.) 824, 109 Am. St. Rep. 322; *Iron Molders' Union v. Allis-Chalmers Co.*, 166 Fed. 45, 91 C. C. A. 631, 20 L. R. A. (N. S.) 315; *Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co.* (C. C.) 54 Fed. 746, 19 L. R. A. 387.

⁸⁵ "Crucial Issues in Labor Litigation," by Jeremiah Smith, 20 Harv. Law Rev. 278.

⁸⁶ "A strike is designated as a 'sympathetic' strike where the striking employes have no demands or grievances of their own, but strike

ted, clearly should be regarded as illegal,³⁷ as should likewise a combination to blacklist "when directed against persons with whom those combining have no trade dispute."³⁸

It is inevitable that there must be a twilight zone. Take, for instance, the purpose of building up, or strengthening the organization. In *Plant v. Woods*,³⁹ we have a case where the members of one union sought an injunction to restrain the members of a rival union from acts or methods tending to prevent the plaintiffs from securing employment or continuing in their employment. The object of defendants had been to compel plaintiffs to join them. Here it was said⁴⁰ that "the necessity that the plaintiffs should join this association is not so great, nor is its relation to the rights of the defendants, as compared with the right of the plaintiffs to be free from molestation, such as to bring the acts of the defendants under the shelter of the principles of trade competition."⁴¹

It is on the question of the closed shop that there exists the greatest difference of opinion.⁴²

for the purpose of indirectly aiding other unions or organizations who have struck." *Eddy on Combinations*, vol. 1, § 520.

³⁷ *Thomas v. Cincinnati, N. O. & T. P. Ry. Co.* (C. C.) 62 Fed. 803. Cf. *Burnham v. Dowd*, 217 Mass. 351, 104 N. E. 841, 51 L. R. A. (N. S.) 778.

³⁸ *Cornellier v. Haverhill Shoe Mfrs'. Ass'n* (1915) 221 Mass. 554, 109 N. E. 643, 644, L. R. A. 1916C, 218.

³⁹ 176 Mass. 492, 57 N. E. 1011, 51 L. R. A. 339, 79 Am. St. Rep. 330.

⁴⁰ 176 Mass. 502, 57 N. E. 1011, 51 L. R. A. 339, 79 Am. St. Rep. 330.

⁴¹ To the same effect, *Curran v. Galen*, 152 N. Y. 33, 46 N. E. 297, 37 L. R. A. 802, 57 Am. St. Rep. 496; *Erdman v. Mitchell*, 207 Pa. 79, 56 Atl. 327, 63 L. R. A. 534, 99 Am. St. Rep. 783. Cf. *Coons v. Chrystie*, 24 Misc. Rep. 296, 53 N. Y. Supp. 668.

⁴² On the one hand the Supreme Court of Illinois after a most thorough discussion has stated its conclusion to be that "if it is proper for workmen to organize themselves into such combinations as labor unions, it must necessarily follow that it is proper for them to adopt any proper means to preserve that organization. If the securing of the closed shop is deemed by the members of a labor union of the utmost importance and necessary for the preservation of their organization, through which, alone, they have been enabled to secure better wages and better working conditions, and if to secure that is the primary object of the threat to strike, even though in the successful prosecution of the object of the combination, injury

If the object is found to be a proper one, the next question is as to the means employed. Admitting that workmen may combine and meet the employer as a unit in an endeavor to secure better terms and that there is a recognized right of competition as between the workmen themselves, it is equally true that there exists a right not to be molested in the pursuit of one's trade or calling. Whether in any particular case, this molestation, which to a certain extent must inevitably occur, is of such a character and has reached such a point that it will be declared excessive and hence illegal, may be a question of great difficulty. A man might not be liable for calling a workman a "scab" in the street or for following him to and from his home. But let one hundred men do so and the result is vastly different.⁴³

may result incidentally to non-union men through the loss of their positions, that object does not become unlawful." *Kemp v. Division No. 241 Amalgamated Ass'n S. & E. Ry. Employés*, 255 Ill. 213, 226, 99 N. E. 389, Ann. Cas. 1913D, 347, per Cooke, J. See *Nat. Protective Ass'n v. Cumming*, 170 N. Y. 315, 63 N. E. 369, 58 L. R. A. 135, 88 Am. St. Rep. 648, "Boycott—Action by Non-Union Employés to Enjoin a Union from Compelling their Discharge," 7 Ill. Law. Rev. 320.

A contrary view is taken by the Massachusetts Supreme Court in an action brought by the employer where it was said: "Conduct directly affecting an employer to his detriment, by interference with his business, is not justifiable in law unless it is of a kind and for a purpose that has a direct relation to benefits that the laborers are trying to obtain. Strengthening the forces of a labor union, to put it in a better condition to enforce its claims in controversies that may afterwards arise with employers, is not enough to justify an attack upon the business of an employer by inducing his employés to strike." *FOLSOM v. LEWIS*, 208 Mass. 336, 338, 94 N. E. 316, 35 L. R. A. (N. S.) 787, Chapin Cas. Torts, 237, per Knowlton, C. J. To the same effect, *Lucke v. Clothing Cutters' & Trimmers' Assembly*, etc., 77 Md. 396, 26 Atl. 505, 19 L. R. A. 408, 39 Am. St. Rep. 421; *George Jonas Glass Co. v. Glass Bottleblowers' Ass'n*, 72 N. J. Eq. 653, 66 Atl. 953. Cf. *Cornellier v. Haverhill Shoe Mfrs'. Ass'n* (1915) 221 Mass. 554, 109 N. E. 643, L. R. A. 1916C, 218, apparently recognizing the right to strike to secure recognition of the union. See "Right of Labor Unions to Strike for the Enforcement of the Closed Shop," 13 Columbia L. Rev. 66.

⁴³ See *Jersey City Printing Co. v. Cassidy*, 63 N. J. Eq. 759, 53 Atl. 230.

Picketing is perhaps the best illustration. Former employés may singly persuade other workmen to join the strike or to refrain from entering the master's employment. Nor would concerted persuasion and the maintenance of a picket for the purpose be unlawful *per se*.⁴⁴ But the picketing must not be conducted in such a manner that it becomes an instrument of coercion.⁴⁵ Even "persuasion or entreaty may be so persistent as to constitute intimidation,"⁴⁶ and experience has shown that whatever the original intention may have been, picketing is likely to become coercive if continued for any length of time.⁴⁷ But though picketing be not unlawful *per se*, defendants will be liable where there has been intimi-

⁴⁴ *Jones v. Van Winkle Gin & Machine Works*, 131 Ga. 336, 62 S. E. 236, 17 L. R. A. (N. S.) 848, 127 Am. St. Rep. 235; *Karges Furniture Co. v. Amalgamated Woodworkers' Local Union*, No. 131, 165 Ind. 421, 75 N. E. 877, 2 L. R. A. (N. S.) 788, 6 Ann. Cas. 829; *W. & A. Fletcher Co. v. International Ass'n* (N. J. Ch. 1903) 55 Atl. 1077; *Everett Waddey Co. v. Richmond Typographical Union*, 105 Va. 188, 53 S. E. 273, 5 L. R. A. (N. S.) 792, 8 Ann. Cas. 798; *Iron Molders' Union v. Allis-Chalmers Co.*, 166 Fed. 45, 91 C. C. A. 631, 20 L. R. A. (N. S.) 315. See "Clayton Act," quoted *infra*, p. 436.

⁴⁵ *Jones v. Van Winkle Gin & Machine Works*, *supra*; *Vegelahn v. Guntner*, 167 Mass. 92, 44 N. E. 1077, 35 L. R. A. 722, 57 Am. St. Rep. 443; *Jones v. Maher*, 62 Misc. Rep. 388, 116 N. Y. Supp. 180, affirmed 141 App. Div. 919, 125 N. Y. Supp. 1126. See Eddy on Combinations, § 537.

⁴⁶ *Rogers v. Evarts* (Sup.) 17 N. Y. Supp. 264, 269, per Smith, J.

⁴⁷ "It is usually done by persons who are ignorant of the line where persuasion ends and intimidation begins; who are actuated to a considerable extent, by a determination to accomplish the ultimate object—the prevention of employment at the factory. They are men who have never felt the responsibility attendant upon the exercise of power. When they know that the result which they wish to accomplish can be certainly attained by the use of intimidation or force, the line of persuasion is very apt to become obscure and to be ignored and conduct which ought to be simple persuasion between one man and another becomes a course of threatening or violence for the accomplishment of the result sought." *George Jonas Glass Co. v. Glassblowers' Ass'n*, 64 N. J. Eq. 644, 647, 54 Atl. 567, per Grey, V. C. Indeed, it has been remarked that "there is and can be no such thing as peaceful picketing any more than there can be chaste vulgarity or peaceful mobbing or lawful lynching." *Atchison, T. & S. F. Ry. Co. v. Gee* (C. C.) 139 Fed. 582, 584, per McPherson, J.

dation by physical violence,⁴⁸ turbulent conduct or threats of violence,⁴⁹ or by demonstrations of force.⁵⁰ So intimidation has been brought about by the display of placards⁵¹ or banners,⁵² the distribution of circulars,⁵³ the publication of advertisements,⁵⁴ and by threats to publish in a so-called "scab list."⁵⁵ It is not unlawful for the striking union to pay for the support of its members while unemployed,⁵⁶ nor would it seem unlawful to pay the expenses of "strike breakers" who have been induced to leave. In New York the latter expenditure has been characterized as "only a just provision to those who have surrendered their wages."⁵⁷ It is doubtful,

⁴⁸ *Underhill v. Murphy*, 117 Ky. 640, 78 S. W. 482, 111 Am. St. Rep. 262, 4 Ann. Cas. 780; *Cumberland Glass Mfg. Co. v. Glass Bottle Blowers' Ass'n*, 59 N. J. Eq. 49, 46 Atl. 208; *Herzog v. Fitzgerald*, 74 App. Div. 110, 77 N. Y. Supp. 366; *Union Pac. R. Co. v. Reuf* (C. C.) 120 Fed. 102.

⁴⁹ *Beaton v. Tarrant*, 102 Ill. App. 124; *Connett v. United Hatters*, 76 N. J. Eq. 202, 74 Atl. 188; *Jones v. Maher*, 62 Misc. Rep. 388, 116 N. Y. Supp. 180, affirmed 141 App. Div. 919, 125 N. Y. Supp. 1126; *Murdock, Kerr & Co. v. Walker*, 152 Pa. 595, 25 Atl. 492, 34 Am. St. Rep. 678.

⁵⁰ *Mackall v. Ratchford* (C. C.) 82 Fed. 41; *United States v. Kane* (C. C.) 23 Fed. 748.

⁵¹ *Goldberg, Bowen & Co. v. Stablemen's Union*, 149 Cal. 429, 86 Pac. 806, 8 L. R. A. (N. S.) 460, 117 Am. St. Rep. 145, 9 Ann. Cas. 1219; *Springhead Spinning Co. v. Riley*, L. R. 6 Eq. 551.

⁵² *Sherry v. Perkins*, 147 Mass. 212, 17 N. E. 307, 9 Am. St. Rep. 689.

⁵³ *Beck v. Ry. Teamsters' Protective Union*, 118 Mich. 497, 77 N. W. 13, 42 L. R. A. 407, 74 Am. St. Rep. 421.

⁵⁴ *Springhead Spinning Co. v. Riley*, L. R. 6 Eq. 551.

⁵⁵ *State v. Stewart*, 59 Vt. 273, 9 Atl. 559, 59 Am. Rep. 710. But as to the circulation of libelous matter, cf. *Butterick Pub. Co., Ltd., v. Typographical Union*, 50 Misc. Rep. 1, 100 N. Y. Supp. 292.

⁵⁶ *Everett Waddey Co. v. Richmond Typographical Union*, 105 Va. 188, 53 S. E. 273, 5 L. R. A. (N. S.) 792, 8 Ann. Cas. 798; *A. R. Barnes & Co. v. Berry* (C. C.) 157 Fed. 883.

⁵⁷ *Rogers v. Evarts* (Sup.) 17 N. Y. Supp. 264, 269. In accord, *Johnston Harvester Co. v. Meinherdt*, 9 Abb. N. C. (N. Y.) 393. Cf. *George Jonas Glass Co. v. Glass Bottle Blowers' Ass'n*, 72 N. J. Eq. 653, 665, 66 Atl. 953, affirmed 77 N. J. Eq. 219, 79 Atl. 262, 41 L. R. A. (N. S.) 445. Contra, *Tunstall v. Stearns Coal Co.*, 192 Fed. 808, 113 C. C. A. 132, 41 L. R. A. (N. S.) 453, where the payments are said to have been made "with the primary purpose to injure another and with only a secondary or collateral reflex self-benefit."

however, whether this would be true where the breach of an existing contract has been procured by such means.⁵⁸

In the recent Clayton Act, Congress has embodied many of the foregoing principles.⁵⁹

92. (II) PROSPECTIVE CONTRACTS NOT OF EMPLOYMENT

For greater convenience in grouping the authorities and not because of any difference in principle, a division may be made between cases where (1) the interference does not arise out of a labor controversy, and (2) where it does.

⁵⁸ See *Smithies v. Nat. Ass'n of Operative Plasterers*, L. R. (1909) 1 K. B. 310.

⁵⁹ See Clayton Act (38 Stat. c. 323, Act Cong. Oct. 15, 1914) § 20, providing: .

"That no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof in any case between an employer and employes, or between employers and employes, or between employes, or between persons employed and persons seeking employment, involving or growing out of a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

"And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value or from peacefully assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States."

Non-Labor Controversies

On grounds already stated⁶⁰ it is difficult to understand how any cause of action can arise if C. has merely persuaded B. not to enter into business relations with A., even though C.'s motive was purely malevolent.⁶¹ For example, suppose a banker who is a man of wealth and standing in his community, determines to ruin the village barber. With that end in view, he establishes a new barber shop, employs a barber to carry on the business, and uses his personal influence to attract customers. To hold, as did the Minnesota Supreme Court, that there is here a cause of action merely because malice existed⁶² would seem to give unwarranted effect to motive. It does not appear to be in accord with sound public policy that a right to engage in legitimate business should be made to depend upon the finding of a jury.

Suppose the refusal to contract is brought about by means of an inducement or a threat to do a lawful act. For example, an employer asserts his intention to discharge any employé employed at will if the latter deal with a certain merchant. Assuming that there is no legal excuse, why should not the added pressure furnish ground for an action for reasons already stated where the proposed contract was of employment?⁶³ On this point the cases are conflicting, and even where recovery has been allowed the reasons given are decidedly unsatisfactory.⁶⁴ It is some-

⁶⁰ See *supra*, p. 427.

⁶¹ But see *Transportation Co. v. Standard Oil Co.*, 50 W. Va. 611, 40 S. El. 591, 56 L. R. A. 804, 88 Am. St. Rep. 895; *Delz v. Winfree*, 80 Tex. 400, 16 S. W. 111, 26 Am. St. Rep. 755.

⁶² *Tuttle v. Buck*, 107 Minn. 145, 119 N. W. 946, 22 L. R. A. (N. S.) 599, 131 Am. St. Rep. 446, 16 Ann. Cas. 807. Cf. *Dunshee v. Standard Oil Co.* (1911) 152 Iowa, 618, 132 N. W. 371, 36 L. R. A. (N. S.) 263.

⁶³ See *supra*, p. 427.

⁶⁴ Recovery allowed in *Graham v. St. Charles St. R. Co.*, 47 La. Ann. 214, 16 South. 806, 27 L. R. A. 416, 49 Am. St. Rep. 366 (Cf. *Id.*, 47 La. Ann. 1656, 18 South. 707, 49 Am. St. Rep. 436); *International & G. M. R. Co. v. Greenwood*, 2 Tex. Civ. App. 76, 21 S. W. 559. Contra, *Heywood v. Tillson*, 75 Me. 225, 46 Am. Rep. 373; *Payne v. Western & Atl. R. Co.*, 13 Lea (Tenn.) 507, 49 Am. Rep. 666. If competition exists, defendant's act may be justified. (See *infra*, p. 446.) In

times asserted that where the act threatened is *per se* lawful a bad motive will not of itself warrant recovery.⁶⁵ The answer is that the defendant is not merely exercising or threatening to exercise a legal right to do or refrain. He is attempting to use or threatening to use that right to induce another party to take action damaging to a third, who himself possesses a right to be left free from unreasonable interference.⁶⁶ It is also said that what one may do, may be done by several.⁶⁷ But for reasons already stated⁶⁸ it would seem proper to distinguish between acts of a single defendant and those done pursuant to a conspiracy or combination,⁶⁹ a distinction which has found recognition in anti-trust legislation.⁷⁰

The object may be one which the law will recognize such as the protection of business interests in the exercise of the right to compete.⁷¹ Competition it has been

Guethler v. Altman, 26 Ind. App. 587, 60 N. E. 355, 84 Am. St. Rep. 313, a storekeeper it was held, had no right of action against a school teacher and members of a school board because they had maliciously persuaded pupils not to deal with him and had threatened to suspend any pupil disobeying. The decision appears to have been based upon defendants' right to lay down reasonable rules for school management and discipline. In accord, *Gott v. Berea College*, 156 Ky. 376, 161 S. W. 204, 51 L. R. A. (N. S.) 17; *Jones v. Cody*, 132 Mich. 13, 92 N. W. 495, 62 L. R. A. 160.

⁶⁵ Of course, defendant will be liable if the means employed are unlawful; e. g., fraudulent. *Morgan v. Andrews*, 107 Mich. 33, 64 N. W. 869.

⁶⁶ "Crucial Issues in Labor Litigation," by Jeremiah Smith, 20 Harv. Law Rev. 271 et seq.

⁶⁷ See *Delz v. Winfree*, 80 Tex. 400, 16 S. W. 111, 26 Am. St. Rep. 755.

⁶⁸ See *supra*, pp. 429, 430.

⁶⁹ See *Ertz v. Produce Exchange*, 79 Minn. 140, 81 N. W. 737, 48 L. R. A. 90, 79 Am. St. Rep. 433 (where however no distinction was drawn in the opinion between the acts of one and the joint acts of a number); *Hawarden v. Youghiogheny & L. Coal Co.*, 111 Wis. 545, 87 N. W. 472, 55 L. R. A. 828.

⁷⁰ *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U. S. 600, 34 Sup. Ct. 951, 58 L. Ed. 1490, L. R. A. 1915A, 788; *Grenada Lumber Co. v. Mississippi*, 217 U. S. 433, 30 Sup. Ct. 535, 54 L. Ed. 826.

⁷¹ Indeed it is questionable whether there can be any protection accorded unless the element of competition is present. For example,

said, is the life of trade. "One may without liability induce the customers of another to withdraw their custom from him in the race of competition in order that the former may himself get the custom, there being no contract, and it is no matter that such person is injured, and it is no matter that the other party was moved by express intent to injure him, motive being immaterial where the act is not unlawful."⁷² This doctrine found recognition at an early date,⁷³ and is now thoroughly established. Thus, in the absence of statutory prohibition,⁷⁴ a trader or body of traders for the purpose of increasing business may allow rebates or discounts,⁷⁵ fix low rates or prices,⁷⁶ or refuse to deal with parties who entertain business relations with a competitor.⁷⁷ So a merchant will not subject himself to liability if he offer for sale at a cut price goods owned by him though his purpose be to injure the manufacturer's trade and depress prices,⁷⁸ nor will an association which notifies

merchants will be liable to a hotel keeper if they deprive him of custom by refusing to buy from drummers who patronize his hotel where their object was to punish him for his conduct as tax assessor. *Webb v. Drake*, 52 La. Ann. 290, 26 South. 791. To the same effect, *Wesley v. Native Lumber Co.*, 97 Miss. 814, 53 South. 346, Ann. Cas. 1912D, 796.

⁷² *Transportation Co. v. Standard Oil Co.*, 50 W. Va. 611, 624, 40 S. E. 591, 56 L. R. A. 804, 88 Am. St. Rep. 895, per Brannon, J. To the same effect, *Johnson v. Hitchcock*, 15 Johns. (N. Y.) 185.

⁷³ See *Anonymous*, Y. B. 11 Hen. IV, fol. 47, pl. 21. Two masters of a grammar school brought a writ of trespass against another master and counted that the defendant had started a school in the same town so that whereas the plaintiffs had formerly received 40d. or two shillings, a quarter from each child, now they got only 12d. But in the opinion of the Court the writ would not lie.

⁷⁴ As in the case of common carriers. See Pub. Service Commissions Law N. Y. (Consol. Laws, c. 48) §§ 31-33; U. S. Comp. St. 1913, §§ 8564, 8565, 8574, 8597.

⁷⁵ *Munhall v. Penn. R. Co.*, 92 Pa. 150; *Mogul S. S. Co. v. McGregor*, [1892] App. Cas. 25. Cf. *Lough v. Outerbridge*, 143 N. Y. 271, 38 N. E. 292, 25 L. R. A. 674, 42 Am. St. Rep. 712.

⁷⁶ *Mogul S. S. Co. v. McGregor*, [1892] App. Cas. 25.

⁷⁷ *Master Builders' Ass'n v. Domascio*, 16 Colo. App. 25, 63 Pac. 782; *Bowen v. Matheson*, 14 Allen (96 Mass.) 499; *Lewis v. Huie-Hodge Lumber Co.*, 121 La. 658, 46 South. 685.

⁷⁸ *Passaic Print Works v. Ely & Walker Dry Goods Co.*, 105 Fed.

dealers in supplies not to sell to others than members under penalty of loss of patronage, here the desire likewise being to become free from competition with a view to increasing profits.⁷⁹ Further illustrations are given in the note.⁸⁰

But although a trade war may be waged *à outrance*, there are certain rules of combat which must be observed. One may not circulate defamatory reports about a competitor,⁸¹ nor counterfeit his trade-marks, labels, wrappers, or containers,⁸² the badges or uniforms of his employés,⁸³ or the appearance of his place of business.⁸⁴ The test is whether the resemblance is so great as to deceive the ordinary purchaser acting with the caution usually exercised in such transactions, so that he may mistake the goods of the one for those of the other.⁸⁵

163, 44 O. O. A. 426, 62 L. R. A. 673. In *Apello v. Worsley*, [1898] 1 Ch. 274, 77 L. T. N. S. 783, 67 L. J. Ch. N. S. 172, the same result was reached and the fact that defendant might not have actually owned the goods was not regarded as controlling. In neither case does the court lay stress on competition.

⁷⁹ *MACAULEY BROS. v. TIERNEY*, 19 R. I. 255, 33 Atl. 1, 37 L. R. A. 455, 61 Am. St. Rep. 770, Chapin Cas. Torts, 239. To the same effect *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, 55 N. W. 1119, 21 L. R. A. 337, 40 Am. St. Rep. 319.

⁸⁰ *Peerless Pattern Co. v. Pictorial Review Co.*, 147 App. Div. 715, 132 N. Y. Supp. 37; *Collins v. American News Co.*, 34 Misc. Rep. 260, 69 N. Y. Supp. 638, affirmed 69 App. Div. 639; *Swift & Co. v. Allen* (Tex. Civ. App. 1912) 151 S. W. 645; *Rocky Mountain Bell Telephone Co. v. Utah Independent Telephone Co.*, 31 Utah, 377, 88 Pac. 26, 8 L. R. A. (N. S.) 1153.

⁸¹ *Standard Oil Co. v. Doyle*, 118 Ky. 662, 82 S. W. 271, 111 Am. St. Rep. 331; *Van Horn v. Van Horn*, 52 N. J. Law, 284, 20 Atl. 485, 10 L. R. A. 184.

⁸² *New England Awl & Needle Co. v. Marlborough Awl & Needle Co.*, 168 Mass. 154, 46 N. E. 386, 60 Am. St. Rep. 377; *Conrad v. Joseph Uhrig Brewing Co.*, 8 Mo. App. 277; *Wirtz v. Eagle Bottling Co.*, 50 N. J. Eq. 164, 24 Atl. 658; *Taendsticksfabriks Aktiebolaget Vulcan v. Myers*, 139 N. Y. 364, 34 N. E. 904; *Juan F. Portuondo Cigar Mfg. Co. v. Vicente Portuondo Cigar Mfg. Co.*, 222 Pa. 116, 70 Atl. 968; *Oppermann v. Waterman*, 94 Wis. 583, 69 N. W. 569; *Holeproof Hosiery Co. v. Wallach Bros.* (C. C.) 167 Fed. 373.

⁸³ *Marsh v. Billings*, 7 Cush. (Mass.) 322, 54 Am. Dec. 723.

⁸⁴ *Weinstocker v. Marks*, 109 Cal. 529, 42 Pac. 142, 30 L. R. A. 182, 50 Am. St. Rep. 57.

⁸⁵ *Wirtz v. Eagle Bottling Co.*, 50 N. J. Eq. 164, 24 Atl. 658;

Nor may one harass or annoy the competitor's customers⁸⁶ or employés.⁸⁷ In a word, the competition must not be "unfair." In cases such as these,⁸⁸ plaintiff usually asks not merely for damages but in addition for the equitable remedy of injunction.

Labor Controversies

It is here that the boycott usually occurs.⁸⁹ For example, A.'s employés go on strike and by persuasion induce B., a customer of A., to cease dealing with the latter. This is a mild form. If done by an individual workman, then, as already seen,⁹⁰ there would appear no reason why a cause of action should be given A. Should the result be different because a number of employés are working in concert? Surely A. has a right to insist that the course of trade be permitted to flow to and from him without unreasonable obstruction. It requires numbers to erect the dam. In such cases, the language may be persuasive, almost invariably the undertone is decidedly forceful.⁹¹ The agree-

Fischer v. Blank, 138 N. Y. 244, 83 N. E. 1040; *Heinz v. Lutz*, 146 Pa. 592, 23 Atl. 314; *McLean v. Fleming*, 96 U. S. 245, 24 L. Ed. 828; *Centaur Co. v. Neathery*, 91 Fed. 891, 34 C. C. A. 118.

⁸⁶ *Sparks v. McCreary*, 156 Ala. 382, 47 South. 332, 22 L. R. A. (N. S.) 1224; *Standard Oil Co. v. Doyle*, 118 Ky. 662, 82 S. W. 271, 111 Am. St. Rep. 331; *Tarleton v. McGawley*, Peake, 205.

⁸⁷ *Standard Oil Co. v. Doyle*, *supra*. Cf. *Evenson v. Spaulding*, 150 Fed. 517, 82 C. C. A. 263, 9 L. R. A. (N. S.) 904.

⁸⁸ For further illustrations, see *Nokes v. Mueller*, 72 Ill. App. 431; *Dunshee v. Standard Oil Co.* (1911) 152 Iowa, 618, 132 N. W. 371, 36 L. R. A. (N. S.) 263; *George G. Fox Co. v. Hathaway*, 199 Mass. 99, 85 N. E. 417, 24 L. R. A. (N. S.) 900; *United States Frame & Picture Co. v. Horowitz*, 51 Misc. Rep. 101, 100 N. Y. Supp. 705, affirmed 139 App. Div. 895, 123 N. Y. Supp. 476; *Arnheim v. Arnheim*, 28 Misc. Rep. 399, 59 N. Y. Supp. 948; *Halstead v. Houston* (C. C.) 111 Fed. 376.

⁸⁹ For origin of the term, see *State v. Glidden*, 55 Conn. 46, 76, 8 Atl. 890, 3 Am. St. Rep. 23.

⁹⁰ See *supra*, p. 427.

⁹¹ Suppose half a dozen men stop a coach, and one of them politely asks the passengers to hand over their valuables, thoughtfully adding, "but you need not do so unless you wish." Would the courtesy displayed prevent the transaction from being considered robbery? See *United States v. Kane* (C. C.) 23 Fed. 748, 750.

ment to act in concert gives to such commonly used expressions as "unfair," "we don't patronize," etc., "a force not inhering in the words themselves, and therefore exceeding any possible right of speech which a single individual may have."⁹² Sound public policy should, it is submitted, warrant a recovery.⁹³

Then, to vary the question, suppose the striking workmen report their grievance to a labor association which includes employes in other shops and the association take up the quarrel? It is submitted that the non-striking members should here be held responsible since their act is analogous to a sympathetic strike.⁹⁴ To advance a step, suppose pressure is brought to bear upon the outsider by doing or threatening to do an act not unlawful in itself, as if the union announce its intention to refrain from dealing with him if he prove recalcitrant. True each member has a right to spend his money as he please. But the fallacy of the conclusion that all the members may take concerted action is apparent. "It loses sight of the combination, the whole strength of which lies in the fact that each individual has surrendered his own discretion and will."⁹⁵ There is no analogy between this case and one where an associa-

⁹² *Gompers v. Buck's Stove & Range Co.*, 221 U. S. 418, 439, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874, per Lamar, J.

⁹³ See *American Federation of Labor v. Buck's Stove & Range Co.*, 83 App. D. C. 83, 32 L. R. A. (N. S.) 748; *Beck v. Railway Teamsters' Protective Union*, 118 Mich. 497, 77 N. W. 13, 42 L. R. A. 407, 74 Am. St. Rep. 421; *Rocky Mountain B. T. Co. v. Montana Federation of Labor (C. C.)* 156 Fed. 809; *Hopkins v. Oxley Stave Co.*, 83 Fed. 912, 28 C. C. A. 99. In *Lawlor v. Loewe*, 235 U. S. 522, 35 Sup. Ct. 170, 59 L. Ed. 341, defendants who had resorted to the use of "we don't patronize" and "unfair" lists were held liable in an action under the Sherman Anti-Trust Law. But cf. Clayton Act of 1914 (*supra*, p. 436).

⁹⁴ *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 30 Atl. 881. See *Hopkins v. Oxley Stave Co.*, 83 Fed. 912, 28 C. C. A. 99.

⁹⁵ *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 123, 30 Atl. 881, per Green, V. C. To the same effect, *Wilson v. Hey*, 232 Ill. 389, 83 N. E. 928, 16 L. R. A. (N. S.) 85, 122 Am. St. Rep. 119, 18 Ann. Cas. 82; *Matthews v. Shankland*, 25 Misc. Rep. 604, 56 N. Y. Supp. 123; *Casey v. Typographical Union No. 3 (C. C.)* 45 Fed. 135, 12 L. R. A. 193. Contra, *Pierce v. Stablemen's Union*, 156 Cal. 70, 103 Pac. 324.

tion of traders declines to deal with A. unless A. refuses to deal with B., a competitor.⁹⁶ The labor union is not a competitor of the employer. It merely has a controversy with him. The same principle, namely, that a dealer should have the right to a free market, governs where the union notifies prospective customers of the former employer that they will refuse to work for one who uses the latter's goods.⁹⁷ A similar attempt to draw a neutral into the field is shown in *Temperton v. Russell*.⁹⁸ Three trade unions sought to coerce a firm of builders by requesting Temperton, a dealer in building materials, to cease supplying such firm. Temperton refused and the unions then notified one Brentano, who was in the custom of supplying Temperton, that if he continued to do so, his union employes would be withdrawn. Brentano thereupon declined to enter into further contracts with Temperton. The latter, it was held, might recover from officers of the union.⁹⁹ It will be observed that the original dispute was not

⁹⁶ See *supra*, pp. 439, 440.

⁹⁷ "An agreement by those to be benefited by it, that they will themselves observe its terms in accepting employment, even if employers be incidentally embarrassed thereby, can occasion no injury to employers which the law will recognize, for workmen whether bound by a compact among themselves or not, have the absolute right to give their services to whom they please, or to withhold them from whom they please, without responsibility for consequences to employers or to any one else. But this is not the case where the primary purpose is to unlawfully coerce others, that as a result of the coercion, benefits may accrue to those who coerce." *Purvis v. United Brotherhood of Carpenters and Joiners*, 214 Pa. 348, 358, 63 Atl. 585, 12 L. R. A. (N. S.) 642, 112 Am. St. Rep. 757, 6 Ann. Cas. 275, per Brown, J. To the same effect, *Purington v. Hinchliff*, 219 Ill. 159, 76 N. E. 47, 2 L. R. A. (N. S.) 824, 109 Am. St. Rep. 322; *Gray v. Buildings Trades Council*, 91 Minn. 171, 97 N. W. 663, 1118, 63 L. R. A. 753, 103 Am. St. Rep. 477, 1 Ann. Cas. 172; *Lohse Patent Door Co. v. Fuelle*, 215 Mo. 421, 114 S. W. 997, 22 L. R. A. (N. S.) 607, 128 Am. St. Rep. 492; *BOOTH & BRO. v. BURGESS*, 72 N. J. Eq. 181, 65 Atl. 226, Chapin Cas. Torts, 244; *Shine v. Fox Bros. Mfg. Co.*, 156 Fed. 357, 86 C. C. A. 311; *Quinn v. Leathem*, [1901] App. Cas. 495.

⁹⁸ [1893] 1 Q. B. 715.

⁹⁹ Cf. *American Federation of Labor v. Buck's Stove & Range Co.*, 33 App. D. C. 83, 82 L. R. A. (N. S.) 748; *My Maryland Lodge v.*

with Temperton but with the firm of builders. In other words, A., to win his fight with B., attempts to coerce X. into an alliance against B. X. refuses to become a party to the controversy. Then A. forces Y. into an alliance against X. Here A. is going too far. So, it has been held, members of a labor union may not refuse to handle materials sold by one who furnishes supplies to an employer declared to be "unfair" and threaten their own employers with strikes if such materials are used.¹⁰⁰

Of course where the means employed are wrongful *per se*, e. g., physical violence or threats thereof, or intimidation, there can be no doubt that a cause of action exists.¹⁰¹

93. (III) EXISTING CONTRACTS OF EMPLOYMENT

The common law recognized in the master a right to recover for loss of services where violence had been used against the servant. Here there was deemed to be an interference with a relationship or status, and hence it made no difference that the hiring was merely at will.¹⁰² The Statutes of Laborers, passed in 1349 and 1350,¹⁰³ gave a

Adt, 100 Md. 238, 59 Atl. 721, 68 L. R. A. 752; *Lyons v. Wilkins*, [1896] L. R. 1 Ch. 811.

¹⁰⁰ *Burnham v. Dowd*, 217 Mass. 351, 104 N. E. 841, 51 L. R. A. (N. S.) 778.

¹⁰¹ *Goldberg, Bowen & Co. v. Stablemen's Union*, 149 Cal. 429, 86 Pac. 806, 8 L. R. A. (N. S.) 460, 117 Am. St. Rep. 145, 9 Ann. Cas. 1219; *Beck v. Railway Teamsters' Prot. Union*, 118 Mich. 497, 77 N. W. 13, 42 L. R. A. 407, 74 Am. St. Rep. 421; *Butterick Pub. Co. v. Typographical Union*, 50 Misc. Rep. 1, 100 N. Y. Supp. 292; *Matthews v. Shankland*, 25 Misc. Rep. 604, 56 N. Y. Supp. 123.

¹⁰² See "Interference with Social Relations," by John H. Wigmore, 21 Am. Law Rev. 764.

¹⁰³ The Statutes of Laborers (23 Edw. III and 25 Edw. III, St. 1) were enacted in consequence of the great mortality among the lower classes, especially workmen and servants in the pestilence of 1348-49. It is enacted that every person of whatever condition, free or bond, able in body and under the age of sixty not living by merchandise, nor having any certain craft, nor having of his own wherewith to live, nor land of his own on the cultivation of which he may occupy himself, and not being in service, shall be compelled to enter into

cause of action where the servant had departed before his agreed term as against one who had harbored or enticed him. Omitting discussion of their construction and effect ¹⁰⁴ we pass to the next landmark, which is *Lumley v. Gye*, decided in the Queen's Bench in 1853.¹⁰⁵ A majority of the court here held it unnecessary that employer and employed should stand in the strict relation of master and servant. It was emphasized that the interference with contract constituted the basis of the action.¹⁰⁶ Hence a complaint was held good on demurrer, which averred that defendant had maliciously procured an opera singer to break her contract to perform at plaintiff's theater. It may therefore be regarded as sufficient that the agreement is for personal services irrespective of their nature, or whether the breach which defendant procured has been by employer or employé.¹⁰⁷ In some states a statutory cause of action has been created in certain cases.¹⁰⁸

It is asserted that the interference must be malicious which, of course, merely means that it must be without le-

service when required on customary wages. It is likewise made punishable by imprisonment for any mower, reaper or other laborer or servant of whatsoever state or condition he shall be, to depart from service before the expiration of the term agreed on without reasonable cause; and no one is to receive or retain such offender in his service under like pain of imprisonment. For other statutes, see *supra*, pp. 428, 429.

¹⁰⁴ See *Hart v. Aldridge*, Cowp. 54; *Blake v. Lanyon*, 6 Term Rep. 221.

¹⁰⁵ 2 El. & Bl. 216.

¹⁰⁶ Note particularly the opinion by Earle, J.

¹⁰⁷ *Walker v. Cronin*, 107 Mass. 555; *Mealey v. Bemidji Lumber Co.*, 118 Minn. 427, 136 N. W. 1090; *Jersey City Printing Co. v. Cassidy*, 63 N. J. Eq. 759, 53 Atl. 230; *Haskins v. Royster*, 70 N. C. 601, 16 Am. Rep. 780; *Thacker Coal Co. v. Burke*, 59 W. Va. 253, 53 S. E. 161, 5 L. R. A. (N. S.) 1091, 8 Ann. Cas. 885; *Bowen v. Hall*, 6 Q. B. D. 333, 45 J. P. 373, 50 L. J. Q. B. 305, 44 L. T. Rep. N. S. 75, 29 Wkly. Rep. 367. But in *Bourlier Bros. v. Macaulay*, 91 Ky. 135, 15 S. W. 60, 11 L. R. A. 550, 34 Am. St. Rep. 171, there was held to be no cause of action for inducing an actress not to perform at plaintiff's theater as agreed, on the ground that contracts of laborers were alone protected. Cf. *Bryan v. State*, 44 Ga. 328.

¹⁰⁸ E. g. Mississippi (Code 1906, § 1146); North Carolina (Gregory's Supp. to Pell's Revisal, 1913, c. 81, § 3374).

gal excuse.¹⁰⁹ It must be intentional. "The act is malicious when the thing done is with the knowledge of the plaintiff's rights and with the intent to interfere therewith."¹¹⁰ There can, therefore, be no malice unless defendant knows of the existence of the contract,¹¹¹ and it must of course appear that the defendant's acts did in fact constitute an interference.¹¹²

The question now arises whether competition is a sufficient excuse. Here it is thought that a sharp distinction must be made between cases of interference (1) with a contract relation terminable at will, and (2) with a non-terminable contract, which may or may not be legally enforceable by the parties thereto.¹¹³ For instance (1) A. is employing B. under no definite agreement as to time, both parties having the right to quit at will. Both are satisfied, and it is probable that the arrangement will continue in-

¹⁰⁹ *Morgan v. Smith*, 77 N. C. 37.

¹¹⁰ *Employing Printers' Club v. Doctor Blosser Co.*, 122 Ga. 509, 519, 50 S. E. 353, 69 L. R. A. 90, 106 Am. St. Rep. 137, 2 Ann. Cas. 694; *Bowen v. Hall*, 6 Q. B. D. 333, 45 J. P. 373, 50 L. J. Q. B. 305, 44 L. T. Rep. N. S. 75, 29 Wkly. Rep. 367.

¹¹¹ *Ensor v. Bolgiano*, 67 Md. 190, 9 Atl. 529; *McGurk v. Cronenwett*, 199 Mass. 457, 85 N. E. 576, 19 L. R. A. (N. S.) 561; *Clark v. Clark*, 63 N. J. Law, 1, 42 Atl. 770; *Stuart v. Simpson*, 1 Wend. (N. Y.) 376; *Morgan v. Smith*, 77 N. C. 37; *Blake v. Lanyon*, 6 Term Rep. 221.

¹¹² See *Banks v. Eastern Ry. & Lumber Co.*, 46 Wash. 610, 90 Pac. 1048, 11 L. R. A. (N. S.) 485. Here defendant retained a part of its employé's wages for medical services and made an arrangement with a hospital to supply the same. Some employés selected plaintiff a physician and notified defendant to pay their hospital dues to him. Defendant refused and gave notice that any employé not consenting to the deduction would be discharged. Plaintiff it was held, had no cause of action. The court appears to have treated this case as one for procuring breach of contract. But query, in view of the fact that the employés were apparently left at liberty to avail themselves of plaintiff's services. Cf. *Chipley v. Atkinson*, 23 Fla. 206, 1 South. 934, 11 Am. St. Rep. 367; *Butterfield v. Ashley*, 2 Gray (Mass.) 254.

¹¹³ E. g., if the contract were by parol when required to be in writing, *Duckett v. Pool*, 33 S. C. 238, 11 S. E. 689; or had been made by an infant or slave, *Keane v. Boycott*, 2 H. Bl. 511; or had not received required official approval, *Salter v. Howard*, 43 Ga. 601; or was voidable by the servant, not being in conformity with statute, *Doane v. Covel*, 56 Me. 527. See *infra*, p. 456.

definitely. C., a competing worker, says to A.: "Stop employing B. and employ me. I will give you better prices or service." On the other hand, suppose (2) A. is employing B. under a contract which will not expire for a year. C. says to A., "Break this contract and employ me," his object likewise being to get the work for himself.

Now admitting that a cause of action may lie for procuring the breach of terminable contracts,¹¹⁴ yet it has been said that here competition will justify interference. C. should be permitted to get the work for himself or for the fellow members of his union if he can.¹¹⁵ This is very different from a purpose to punish.¹¹⁶ It is also very different where C. has induced A. to breach his existing contract with B.¹¹⁷ This cannot be justified on the theory of com-

¹¹⁴ *Berry v. Donovan*, 188 Mass. 353, 74 N. E. 603, 5 L. R. A. (N. S.) 899, 108 Am. St. Rep. 499, 3 Ann. Cas. 738; *Johnston Harvester Co. v. Meinherdt*, 9 Abb. N. C. (N. Y.) 393.

¹¹⁵ *Pickett v. Walsh*, 192 Mass. 572, 78 N. E. 753, 6 L. R. A. (N. S.) 1067, 116 Am. St. Rep. 272, 7 Ann. Cas. 638; *National Protective Ass'n v. Cumming*, 170 N. Y. 315, 63 N. E. 369, 58 L. R. A. 135, 88 Am. St. Rep. 648. Cf. *Allen v. Flood* (1898) App. Cas. 1, 62 J. P. 595, 67 L. J. Q. B. 119, 77 L. T. Rep. N. S. 717, 46 Wkly. Rep. 258.

¹¹⁶ "There is a manifest discrimination, well recognized, between a combination of workmen to secure the exclusive employment of its members by a refusal to work with none other, and a combination whose primary object is to procure the discharge of an outsider and his deprivation of all employment. In the first case, the action of the combination is primarily for the betterment of its fellow members. In the second case, such action is primarily 'to impoverish and to crush another' by making it impossible for him to work there, or so far as may be possible, anywhere. The difference is between combination for welfare of self and that for the persecution of another. The primary purpose of one may necessarily, but incidentally, require a discharge of an outsider; the primary purpose of the other is such discharge, and, so far as possible an exclusion from all labor in his calling. Self-protection may cause incidental injury to another. Self-protection does not aim at malevolent injury to another. The law views an injury arising from competition differently from an injury done in persecution." *Mills v. United States Printing Co.*, 99 App. Div. 605, 613, 91 N. Y. Supp. 185, per Jenks, J.

¹¹⁷ *Kinney v. Scarbrough Co.*, 138 Ga. 77, 74 S. E. 772, 40 L. R. A. (N. S.) 473; *Iron Molders' Union v. Allis-Chalmers Co.*, 166 Fed. 45, 91 C. C. A. 631, 20 L. R. A. (N. S.) 315; *Read v. Friendly Society*,

petition. It is manifestly unfair.¹¹⁸ B.'s contract right is a property right and the tendency is to accord it protection as such.¹¹⁹ It is difficult to understand why malice or motive should be brought into the question at all where the contract was non-terminable. The point as already stated, really is whether defendant has *knowingly* interfered.¹²⁰

etc., [1902] L. R. 2 K. B. 732, 1 B. R. C. 503. Cf. *Clarkson v. Laiblan* (1913) 178 Mo. App. 708, 161 S. W. 660.

¹¹⁸ *BEEKMAN v. MARSTERS*, 195 Mass. 205, 80 N. E. 817, 11 L. R. A. (N. S.) 201, 122 Am. St. Rep. 232, 11 Ann. Cas. 332, Chapin Cas. Torts, 251. "If the persuasion be used for the indirect purpose of injuring the plaintiff or of benefiting the defendant at the expense of the plaintiff it is a malicious act which is in law and in fact a wrong act and therefore a wrongful act, and therefore an actionable act if injury ensue from it." *Bowen v. Hall*, L. R. 6 Q. B. D. 333, 338, 45 J. P. 373, 50 L. J. Q. B. 305, 44 L. T. Rep. N. S. 75, 29 Wkly. Rep. 367, per Brett, L. J. "If A. wants to get a specially good workman who is under contract with B., as A. knows, and A. gets the workman to break his contract to B.'s injury by giving him higher wages, it would not in my opinion afford A. a defense to an action against him by B., that he could establish that he had no personal *animus* against B. and that it was both to the interest of himself and of the workman that the contract with B. should be broken." *Glamorgan Coal Co. v. South Wales Miners' Fed.*, 72 L. J. K. B. 893, 905, 89 L. T. Rep. N. S. 393, 52 Wkly. Rep. 165, per Romer, L. J.

¹¹⁹ "Where a party has entered into a contract with another to do or not to do a particular act or acts, he has as clear a right to its performance as he has to his property, either real or personal, and that knowingly to induce the other party to violate it is as distinct a wrong as it is to injure or destroy his property." *Raymond v. Yarrington*, 96 Tex. 443, 451, 72 S. W. 580, 73 S. W. 800, 62 L. R. A. 962, 97 Am. St. Rep. 911, per Gaines, C. J. "Our law now recognizes a contract right as property which is to be protected against undue interference by persons not parties to the contract. When a third party intentionally, by the use of any kind of means, causes a breach of the contract involving damage, he is *prima facie* guilty of a tort." *BOOTH & BRO. v. BURGESS*, 72 N. J. Eq. 181, 188, 65 Atl. 226, Chapin Cas. Torts, 244, per Stevenson, V. C. "I presume that the principle is this, viz., that the contract confers certain rights on the person with whom it is made, and not only binds the parties to

¹²⁰ *Employing Printers' Club v. Doctor Blosser Co.*, 122 Ga. 509, 50 S. E. 353, 69 L. R. A. 90, 106 Am. St. Rep. 137, 2 Ann. Cas. 694; *McGurk v. Cronenwett*, 199 Mass. 457, 85 N. E. 576, 19 L. R. A. (N. S.) 561; *Morgan v. Smith*, 77 N. C. 37.

Of course, in any event where the object was improper,¹²¹ or the means used were unlawful,¹²² a cause of action would be recognized.

94. (IV) EXISTING CONTRACTS NOT OF EMPLOYMENT

Much that was stated under the preceding head is applicable here. Admitting that redress is not to be denied merely because the contract may not have been legally enforceable,¹²³ it is nevertheless submitted that where it is indefinite in duration or terminable at will, a proper motive, e. g., competition, may justify interference. If, for instance, A. is supplying B. with goods in fixed quantities at specified periods, or A. and B. are in partnership, in both cases the arrangement being subject to termination at the option of either, it cannot well be argued, that C. could not

it by the obligation entered into, but also imposes on all the world the duty of respecting that contractual obligation." *Temperton v. Russell*, [1893] 1 Q. B. 715, 730, 57 J. P. 676, 62 L. J. Q. B. 412, 69 L. T. Rep. N. S. 78, 4 Reports, 376, 41 Wkly. Rep. 565, per Lopes, L. J. To the same effect, *Mealey v. Benidji Lumber Co.*, 118 Minn. 427, 136 N. W. 1090; *Iron Molders' Union v. Allis-Chalmers Co.*, 166 Fed. 45, 91 C. C. A. 631, 20 L. R. A. (N. S.) 315.

¹²¹ *London Guarantee Co. v. Horn*, 206 Ill. 493, 69 N. E. 526, 99 Am. St. Rep. 185 (to force an employé to surrender a cause of action against the interferer); *Schneider v. Local Union*, No. 60, 116 La. 270, 40 South. 700, 5 L. R. A. (N. S.) 891, 114 Am. St. Rep. 549, 7 Ann. Cas. 868 (to compel a public official to appoint an inspector selected by defendant); *Curran v. Galen*, 152 N. Y. 33, 46 N. E. 297, 37 L. R. A. 802, 57 Am. St. Rep. 496 (to coerce plaintiff to become a member of defendants' organization); *Holder v. Cannon Mfg. Co.*, 135 N. C. 392, 47 S. E. 481 (to punish an employé for his conduct while employed by the interferer). Cf. *Raycroft v. Tayntor*, 68 Vt. 219, 35 Atl. 53, 33 L. R. A. 225, 54 Am. St. Rep. 882.

¹²² *London Guarantee Co. v. Horn*, 206 Ill. 493, 69 N. E. 526, 99 Am. St. Rep. 185 (threat to break contract with employer unless employé at will was discharged); *Perkins v. Pendleton*, 90 Me. 166, 38 Atl. 96, 60 Am. St. Rep. 252 (threats to do unlawful acts); *Hamilton-Brown Shoe Co. v. Saxey*, 131 Mo. 212, 32 S. W. 1106, 52 Am. St. Rep. 622 (threats of violence); *Beattie v. Callanan*, 67 App. Div. 14, 73 N. Y. Supp. 518 ("intimidation, force or fraud"); *Reinecke Coal Min. Co. v. Wood* (C. C.) 112 Fed. 477 (threats of violence).

¹²³ See *supra*, p. 446.

get the business for himself or persuade A. to become associated with him. But, on the other hand, interference if malicious, should entail liability.¹²⁴

Where the contract is for a fixed time, motive would seem irrelevant. As already urged, the point then really is whether defendant has *knowingly* interfered.¹²⁵ Some courts, however, in recognizing a recovery, have so emphasized the existence of wrongful motive as to indicate that it might have been regarded as the determining factor.¹²⁶ But certainly "it is not necessary that the ingredient of actual malice in the sense of personal ill will should exist." The cause of action arises out of the wanton disregard of the rights of a contracting party, causing injury.¹²⁷ What motive can be sufficient? Clearly competition or a desire to benefit himself should not justify C. in going to the length of inducing a breach of A.'s definite contract, whatever may be the rule in the case of prospective contractual rights.¹²⁸

¹²⁴ See *Morgan v. Andrews*, 107 Mich. 33, 64 N. W. 869.

¹²⁵ *Cumberland Glass Mfg. Co. v. De Witt*, 120 Md. 381, 87 Atl. 927, Ann. Cas. 1915A, 702; *Twitchell v. Nelson* (1915) 131 Minn. 375, 155 N. W. 621; *Tubular Rivet & Stud Co. v. Exeter Boot & Shoe Co.*, 159 Fed. 824, 86 C. C. A. 648. Cf. *Knickerbocker Ice Co. v. Gardiner Dairy Co.*, 107 Md. 556, 69 Atl. 405, 16 L. R. A. (N. S.) 746; *Booth & Co. v. Selbold*, 37 Misc. Rep. 101, 74 N. Y. Supp. 776; *New York Bank Note Co. v. Hamilton Bank Note Engraving & Printing Co.*, 83 Hun, 593, 31 N. Y. Supp. 1060; *Quinn v. Leathem*, [1901] A. C. 495, 511, 65 J. P. 708, 70 L. J. P. C. 76, 85 L. T. Rep. N. S. 289, 17 T. L. R. 749, 50 Wkly. Rep. 139.

¹²⁶ *Mahoney v. Roberts*, 86 Ark. 130, 110 S. W. 225; *Swain v. Johnson*, 151 N. C. 93, 65 S. E. 619, 28 L. R. A. (N. S.) 615; *Angle v. Chicago, St. P., M. & O. Ry. Co.*, 151 U. S. 1, 14 Sup. Ct. 240, 38 L. Ed. 55; *Temperton v. Russell*, [1893] 1 Q. B. 715, 57 J. P. 676, 62 L. J. Q. B. 412, 69 L. T. Rep. N. S. 78, 4 Reports, 376, 41 Wkly. Rep. 565. (But cf. *Quinn v. Leathem*, *supra*.)

¹²⁷ *Kirby v. Union Pacific Ry. Co.*, 51 Colo. 509, 517, 119 Pac. 1042, Ann. Cas. 1913B, 461. In accord, *Bitterman v. Louisville & Nashville R. Co.*, 207 U. S. 205, 28 Sup. Ct. 91, 52 L. Ed. 171, 12 Ann. Cas. 693; *Tubular Rivet & Stud Co. v. Exeter Boot & Shoe Co.*, 159 Fed. 824, 86 C. C. A. 648.

¹²⁸ *Cumberland Glass Mfg. Co. v. De Witt*, 120 Md. 381, 87 Atl. 927, Ann. Cas. 1915A, 702; *BEEKMAN v. MARSTERS*, 195 Mass. 205, 80 N. E. 817, 11 L. R. A. (N. S.) 201, 122 Am. St. Rep. 232, 11 Ann. Cas. 332, Chapin Cas. Torts, 251; *Donnelly v. Jackson Bros.*, 2 Tenn.

In one line of decisions recovery is denied altogether. This would appear to be the doctrine adopted by the New York Commission of Appeals. In *Ashley v. Dixon*,¹²⁹ it was said: "If A. has agreed to sell property to B., C. may at any time before the title has passed induce A. not to let B. have the property, and to sell it to himself, provided he be guilty of no fraud or misrepresentation, without incurring any liability to B. A. alone, in such case, must respond to B. for the breach of his contract, and B. has no claim upon or relations with C. While, by the moral law, C. is under obligation to abstain from any interference with the contract between A. and B., yet it is one of those imperfect obligations which the law, as administered in our courts, does not undertake to enforce." Malice is not mentioned, but apparently had it been shown, the result would still have been the same.¹³⁰ In fact, of the courts

Civ. App. 408. See *Wells & Richardson Co. v. Abraham* (C. C.) 146 Fed. 190, affirmed 149 Fed. 408, 79 C. C. A. 228 (in equity); *Sperry & Hutchinson Co. v. Mechanics' Clothing Co.* (C. C.) 128 Fed. 800 (in equity); *Nashville, C. & St. L. Ry. Co. v. McConnell* (C. C.) 82 Fed. 65 (in equity); *Heaton-Peninsular Button Fastener Co. v. Dick* (C. C.) 55 Fed. 23; *Id.*, 52 Fed. 667 (in equity). But see *Roseneau v. Empire Circuit Co.*, 131 App. Div. 429, 115 N. Y. Supp. 511.

¹²⁹ 48 N. Y. 430, 432, 8 Am. Rep. 559, per Earl, C.

¹³⁰ Cf. *Daly v. Cornwell*, 34 App. Div. 27, 54 N. Y. Supp. 107. In *Roseneau v. Empire Circuit Co.*, 131 App. Div. 429, 115 N. Y. Supp. 511, the defendant company which controlled a chain of theaters had refused to book any attraction except upon condition that the owner of the show would refuse to play in competing theaters. This it was held it might lawfully do, notwithstanding that the owners were thereby induced to violate their contracts made with the proprietors of such competing theaters. It was here said (131 App. Div. 436, 115 N. Y. Supp. 517): "The acts which are complained of as having been done by the defendant company were clearly for the financial advantage of the members of such corporation, and therefore the defendants had a right to give force and effect to such plan of action, notwithstanding it resulted in loss and damage to the Court Street Theater Company. A man may do or perform such legal acts as will result in advantage to him, and having done and performed them with that end in view it is unimportant that he may also be actuated by malice and a desire to injure another."

which have adopted this view, some have squarely refused to consider motive at all.¹³¹

Once admit the premise that to procure the breach of a contract cannot constitute *injuria*, and the conclusion may fairly be reached that motive can play no part. But, why should it be admitted? Is A.'s right to have B. perform, less substantial in fact—less worthy of protection—than, say, the right of a pledgor or of a reversioner or remainderman after an outstanding term? Is it of less imperfect obligation than the so-called right of privacy or the right violated by the tort maintenance? Historical reason apart, should any line be drawn between contracts of employment and those not of employment?¹³² The latter may be and perhaps usually are much more valuable. It has sometimes been said that A. should have no recovery against C., the interferer, because A. has a perfect cause of action against B., the contractor.¹³³ Leav-

¹³¹ "It is a truism of the law," says the Supreme Court of California, "that an act which does not amount to a legal injury cannot be actionable because it is done with a bad intent; that what one has a right to do another cannot complain of. It is conceded that one may lawfully persuade or procure another to break his contract with a third person 'if it be done from good motives.' We think the qualification has no place in the proposition. If it is right and the means used to procure the breach are right, the motive cannot make it a wrong any more than a good motive would justify fraud, deceit, slander or violence to effect the same purpose." *BOYSON v. THORN*, 98 Cal. 578, 583, 33 Pac. 492, 21 L. R. A. 233, Chapin Cas. Torts, 256. To the same effect, *Chambers & Marshall v. Baldwin*, 91 Ky. 121, 15 S. W. 57, 11 L. R. A. 545, 34 Am. St. Rep. 165. Cf. *Glencoe Land & Gravel Co. v. Hudson Bros. Commission Co.*, 138 Mo. 439, 40 S. W. 93, 32 L. R. A. 804, 60 Am. St. Rep. 560; *Swain v. Johnson*, 151 N. C. 93, 65 S. E. 619, 28 L. R. A. (N. S.) 615; *Sleeper v. Baker*, 22 N. D. 386, 134 N. W. 716, 39 L. R. A. (N. S.) 864, Ann. Cas. 1914B, 1189.

¹³² "It has been settled in Massachusetts that there is no distinction between a defendant's enticing away the plaintiff's servant and a defendant's inducing a third person to break any other contract between him and the plaintiff." *BEEKMAN v. MARSTERS*, 195 Mass. 205, 210, 80 N. E. 817, 11 L. R. A. (N. S.) 201, 122 Am. St. Rep. 232, 11 Ann. Cas. 332, Chapin Cas. Torts, 251. To the same effect, *American Malting Co. v. Keitel*, 209 Fed. 351, 126 C. C. A. 277. Cf. *Temperton v. Russell*, [1893] L. R. 1 Q. B. 715, 727.

¹³³ *BOYSON v. THORN*, 98 Cal. 578, 33 Pac. 492, 21 L. R. A. 233, Chapin Cas. Torts, 256; *Chambers & Marshall v. Baldwin*, 91 Ky. 121,

ing out of consideration the possibility that B. may be financially worthless,¹⁸⁴ is it for C. to urge this defense? Can one wrongdoer be permitted to escape merely because another is likewise liable? One cause of action is in contract, the other in tort. Nor can the doctrine of proximate cause be invoked, since B.'s act, if treated as an intervention is foreseeable by C.¹⁸⁵ On the whole, therefore, it would seem more logical, as it is certainly fairer, to give to the contract right the protection against intentional interference which is accorded to the better recognized forms of property.¹⁸⁶

Equitable relief has been granted in some cases,¹⁸⁷ two of which are specially noteworthy. Injunctions have been issued against parties who were inducing others to divulge information which the latter had contracted not to communicate,¹⁸⁸ and against defendants who were inducing

15 S. W. 57, 11 L. R. A. 545, 34 Am. St. Rep. 165; *Glencoe Land & Gravel Co. v. Hudson Bros. Commission Co.*, 138 Mo. 439, 446, 40 S. W. 93, 36 L. R. A. 804, 60 Am. St. Rep. 560; *Swain v. Johnson*, 151 N. C. 93, 65 S. E. 619, 28 L. R. A. (N. S.) 615; *Sleeper v. Baker*, 22 N. D. 386, 134 N. W. 716, 39 L. R. A. (N. S.) 864, Ann. Cas. 1914B, 1189; *Cooley on Torts* (3d Ed.) 948.

¹⁸⁴ *Raymond v. Yarrington*, 96 Tex. 443, 451, 72 S. W. 580, 73 S. W. 800, 62 L. R. A. 962, 97 Am. St. Rep. 914.

¹⁸⁵ See *Doremus v. Hennessy*, 176 Ill. 608, 52 N. E. 924, 54 N. E. 524, 43 L. R. A. 797, 802, 68 Am. St. Rep. 203; *Tubular Rivet & Stud Co. v. Exeter Boot & Shoe Co.*, 159 Fed. 824, 86 C. C. A. 648; *Heath v. American Book Co. (C. C.)* 97 Fed. 533. *Quinn v. Leathem*, [1901] A. C. 495, 535, 65 J. P. 708, 70 L. J. P. C. 76, 85 L. T. Rep. N. S. 289, 17 T. L. R. 749, 50 Wkly. Rep. 139; *Temperton v. Russell* (1893) L. R. 1 Q. B. 715, 728; *Bowen v. Hall*, L. R. 6 Q. B. D. 333, 338.

¹⁸⁶ See the following, where recovery at law was given: *Kock v. Burgess* (1914) 167 Iowa, 727, 149 N. W. 858; *Twitchell v. Nelson* (1914) 126 Minn. 423, 148 N. W. 451; *Martens v. Reilly*, 109 Wis. 464, 84 N. W. 840; *Heath v. American Book Co. (C. C.)* 97 Fed. 533. Cf. *Andrews v. Blakeslee*, 12 Iowa, 577.

¹⁸⁷ *Westervelt v. Nat. Paper & Supply Co.*, 154 Ind. 673, 57 N. E. 552; *Garst v. Charles*, 187 Mass. 144, 72 N. E. 839; *Weickgenant v. Eccles*, 173 Mich. 695, 140 N. W. 513; *Sperry & Hutchinson Co. v. Louis Weber & Co. (C. C.)* 161 Fed. 219; *Sperry v. Mechanics' Clothing Co. (C. C.)* 128 Fed. 800.

¹⁸⁸ *F. W. Dodge Co. v. Construction Information Co.*, 183 Mass. 62, 86 N. E. 204, 60 L. R. A. 810, 97 Am. St. Rep. 412; *Chicago Bd. of Trade v. Christie Grain & Stock Co.*, 198 U. S. 236, 25 Sup. Ct. 637,

purchasers of railroad tickets to transfer the latter in violation of their agreement.¹³⁹

It is an interesting question whether a different rule applies where there has been a disturbance of the relation of landlord and tenant. At common law there existed a special writ adapted to a case where tenants had been threatened in life and limb, so that they departed from their tenures to the landlord's damage.¹⁴⁰ But peaceful interference by persuasion or otherwise, gave rise to no cause of action.¹⁴¹ There seems to have been no departure from this doctrine,¹⁴² though there would appear to be no reason why there might not be a recovery here where it would be allowed in other cases of contract.¹⁴³

49 L. Ed. 1031; *Hunt v. New York Cotton Exchange*, 205 U. S. 322, 27 Sup. Ct. 529, 51 L. Ed. 821; *Illinois Commission Co. v. Cleveland Tel. Co.*, 119 Fed. 301, 56 C. C. A. 205; *National Tel. News Co. v. Western Union Tel. Co.*, 119 Fed. 294, 56 C. C. A. 198, 60 L. R. A. 805; *Chicago Bd. of Trade v. Hadden-Krull Co.* (C. C.) 109 Fed. 705 (affirmed in 124 Fed. 1017, 59 C. C. A. 680); *Chicago Bd. of Trade v. C. B. Thomson Commission Co.* (C. C.) 103 Fed. 902; *Exchange Tel. Co. v. Gregory*, [1896] 1 Q. B. 147, 60 J. P. 52, 65 L. J. Q. B. 262, 74 L. T. Rep. N. S. 83 (affirming 73 L. T. Rep. N. S. 120).

¹³⁹ *Kirby v. Union Pac. Ry. Co.*, 51 Colo. 509, 119 Pac. 1042, Ann. Cas. 1913B, 461; *Schubach v. McDonald*, 179 Mo. 163, 78 S. W. 1020, 65 L. R. A. 136, 101 Am. St. Rep. 452; *Kinner v. Lake Shore & M. S. R. Co.*, 69 Ohio St. 339, 69 N. E. 614; *Bitterman v. Louisville & N. R. Co.*, 207 U. S. 205, 28 Sup. Ct. 91, 52 L. Ed. 171, 12 Ann. Cas. 693; *Illinois Cent. R. Co. v. Caffrey* (C. C.) 128 Fed. 770; *Delaware, L. & W. R. Co. v. Frank* (C. C.) 110 Fed. 689; *Nashville, C. & St. L. R. Co. v. McConnell* (C. C.) 82 Fed. 65. *Contra*, *New York Cent. & H. R. R. Co. v. Reeves*, 41 Misc. Rep. 490, 85 N. Y. Supp. 28.

¹⁴⁰ "*Quare tenentibus de vita et mutilatione de vita et mutilatione membrorum suorum comminatus fuit.*" Reg. Brev. 111.

¹⁴¹ See "The Boycott as Ground for Damages," by John H. Wigmore, 21 Am. Law Rev. 509, 515. Pollock on Torts (7th Ed.) 230.

¹⁴² The cases are very few. In each of the following, violent means were used or threatened: *Younggreen v. Shelton*, 101 Ill. App. 89; *Kernan v. Humble*, 51 La. Ann. 389, 25 South. 431; *Aldridge v. Stuyvesant*, 1 N. Y. Super. Ct. 235; *Bell v. Midland Ry. Co.*, 10 C. B. N. S. 287. But Cf. *Walden v. Conn.*, 84 Ky. 312, 1 S. W. 537, 4 Am. St. Rep. 204; *Brown v. Corcoran*, Fed. Cas. No. 1,999.

¹⁴³ Cf. *Gore v. Condon*, 87 Md. 368, 39 Atl. 1042, 40 L. R. A. 382, 67 Am. St. Rep. 352; *Twitchell v. Nelson* (1915) 131 Minn. 375, 155 N. W. 621.

But to a rule which would permit recovery in every case for procuring a breach of contract, there must necessarily be some exceptions "in the nature of privilege for disinterested advice honestly given on a proper occasion."¹⁴⁴ For example, in the language of Stirling, L. J.,¹⁴⁵ "a father who discovered that a child of his had entered into an engagement to marry a person of immoral character would not only be justified in interfering to prevent that contract from being carried into effect, but would greatly fail in his duty to his child if he did not."¹⁴⁶ But these exceptions must necessarily be few.

Whatever divergence there may be when C. has merely made use of his powers of persuasion or other means not improper in themselves, the principle is universally admitted that A. may recover where resort has been had to methods inherently unlawful,¹⁴⁷ such as defamatory statements,¹⁴⁸ fraud¹⁴⁹ or threats and intimidations.¹⁵⁰ It

¹⁴⁴ Pollock on Torts (7th Ed.) p. 322.

¹⁴⁵ Glamorgan Coal Co. v. South Wales Miners' Federation (1903) 2 K. B. 545, 577.

¹⁴⁶ Cf. Legris v. Marcotte, 129 Ill. App. 67; Leonard v. Whetstone, 34 Ind. App. 383, 68 N. E. 197, 107 Am. St. Rep. 252.

¹⁴⁷ BOYSON v. THORN, 98 Cal. 578, 33 Pac. 492, 21 L. R. A. 233, Chapin Cas. Torts, 256; Gore v. Condon, 87 Md. 368, 39 Atl. 1042, 40 L. R. A. 382, 67 Am. St. Rep. 352; Angle v. Chicago, St. P., M. & O. Ry. Co., 151 U. S. 1, 14 Sup. Ct. 240, 38 L. Ed. 55.

¹⁴⁸ See Kock v. Burgess (1914) 167 Iowa, 707, 149 N. W. 858; McClure v. McClintock, 150 Ky. 265, 150 N. W. 332, 42 L. R. A. (N. S.) 388; Angle v. Chicago, St. P., M. & O. Ry. Co., 151 U. S. 1, 14 Sup. Ct. 240, 38 L. Ed. 55.

¹⁴⁹ Morgan v. Andrews, 107 Mich. 33, 64 N. W. 869; Benton v. Pratt, 2 Wend. (N. Y.) 385, 20 Am. Dec. 623; American Law Book Co. v. Edward Thompson Co., 41 Misc. Rep. 396, 84 N. Y. Supp. 225; National Phonograph Co. v. Edison Bell Consol. Phonograph Co. (1908) 1 Ch. 335, 77 L. J. Ch. 218, 98 L. T. Rep. N. S. 291, 24 T. L. R. 201; Green v. Button, 2 C. M. & R. 707, 1 Gale, 349, 5 L. J. Exch. 81, Tyrw. & G. 118. S. had contracted to sell to plaintiffs a quantity of cheese. Defendant, by means of a forged telegram caused S. to believe that plaintiffs did not desire to purchase, whereupon S. sold the cheese to defendant. Defendant liable. Rice v. Manley, 66 N. Y. 82, 23 Am. Rep. 30. Cf. Morehouse v. Terrill, 111 Ill. App. 460.

¹⁵⁰ Doremus v. Hennessy, 176 Ill. 608, 52 N. E. 924, 54 N. E. 524, 68 Am. St. Rep. 203; Day v. Hunnicutt (Tex. Civ. App. 1913) 160

seems preferable to say that the strike or boycott may not here be employed.¹⁵¹

The question whether the contract must have been enforceable at law arises as in cases where the interference was with contracts of employment. Here also the better view would appear to be that, irrespective of its binding effect, it is sufficient that the other party would have performed had there been no interference.¹⁵² But the courts are not in accord.¹⁵³

S. W. 134. Cf. *Chambers & Marshall v. Baldwin*, 91 Ky. 121, 15 S. W. 57, 11 L. R. A. 545, 34 Am. St. Rep. 165.

¹⁵¹ *Aberthaw Const. Co. v. Cameron*, 194 Mass. 208, 80 N. E. 478, 120 Am. St. Rep. 542; *BOOTH & BRO. v. BURGESS*, 72 N. J. Eq. 181, 65 Atl. 226, *Chapin Cas. Torts*, 244; *Beattie v. Callanan*, 82 App. Div. 7, 81 N. Y. Supp. 413; *Schlang v. Ladies' Waist Makers' Union*, 67 Misc. Rep. 221, 124 N. Y. Supp. 289; *Thomas v. Cincinnati, N. O. & T. P. Ry. Co. (C. C.)* 62 Fed. 803.

¹⁵² Thus it is no bar to recovery that the contract was oral in violation of the statute of frauds. *Cumberland Glass Mfg. Co. v. De Witt*, 120 Md. 381, 87 Atl. 927, *Ann. Cas.* 1915A, 702; *Rice v. Manley*, 66 N. Y. 82, 23 Am. Rep. 30; *Benton v. Pratt*, 2 Wend. (N. Y.) 385, 20 Am. Dec. 623. Cf. *Jackson v. Stanfield*, 137 Ind. 592, 36 N. E. 345, 37 N. E. 14, 23 L. R. A. 588. Contra, *Davidson v. Oakes* (1910) 60 Tex. Civ. App. 269, 128 S. W. 944. See *supra*, p. 446.

¹⁵³ That the contract must be one which the party was obligated to perform, see *Roberts v. Clark* (Tex. Civ. App. 1907) 103 S. W. 417; *McGuire v. Gerstley*, 204 U. S. 489, 27 Sup. Ct. 332, 51 L. Ed. 581, affirming 26 App. Cas. D. C. 193 (partnership not alleged to be for definite term).

CHAPTER XVII

INTERFERENCE WITH DOMESTIC RELATIONS

- 95. Injuries to the Husband.
- 96. Injuries to the Wife.
- 97. Injuries to the Parent.
- 98. Injuries to the Master.

INJURIES TO THE HUSBAND

95. The husband has "the right to the conjugal fellowship of the wife, to her company, co-operation, and aid in every conjugal relation."¹ This right is termed "*consortium*." For an unlawful interference therewith the law gives to him a cause of action.

"Injuries that may be offered to a person considered as a husband," says Blackstone,² "are principally three: Abduction, or taking away a man's wife; adultery, or criminal conversation with her; and beating or otherwise abusing her." Manifestly these are not the sole methods of interference with conjugal fellowship. For instance, the wife's affections may have been alienated,³ she may have been persuaded to refuse marital intercourse,⁴ or induced to consent to sexual intercourse with another, though there was no coition.⁵

¹ *Bigaouette v. Paulet*, 134 Mass. 123, 124, 45 Am. Rep. 307.

² Comm. book 3, p. 139.

³ See *infra*, p. 462.

⁴ *Plourd v. Jarvis*, 99 Me. 161, 58 Atl. 774.

⁵ *Roberts v. Jacobs* (S. D. 1916) 156 N. W. 589. Here it was said: "We refuse to subscribe to any rule of law which would recognize as an actionable wrong the consummated act of coition, but would leave to the wronged party no right of recovery for the wrong done him, where by fortunate chance he appeared on the scene of action a moment before the wrongdoer had consummated his villainous purpose and thus prevented such consummation. * * * Surely, while the wrong done the husband may differ in degree from the wrong intended, it did not differ in kind, and we apprehend that, to the

Abduction, Harboring or Enticement

It is said that the old law was so strict "that if one's wife missed her way upon the road, it was not lawful for another man to take her into his house, unless she was benighted and in danger of being lost or drowned, but a stranger might carry her behind him on horseback to market to a justice of the peace for a warrant against her husband or to the spiritual court to sue for a divorce." ⁶ But a doctrine so barbarous can have no place in the law of to-day. Though harboring the wife may constitute an injury to the husband,⁷ there can be no liability where the wife left her husband for just cause.⁸ Indeed, the existence of just cause is not essential, where the wife "is received from principles of humanity."⁹ *A fortiori*, will good faith protect the wife's parent. "A father's house is always open to his children, and whether they be married or unmarried, it is still to them a refuge from evil and a consolation in distress. Natural affection establishes and consecrates this asylum."¹⁰

mind of any right-thinking man or woman, the difference in degree would scarcely be perceptible. * * * Is it possible that the conduct alleged would not tend to destroy 'the comfort of the married life' of respondent, if he had any proper sense of shame and decency? * * * Appellant contends that, inasmuch as there was no evidence tending to show that the wife's affection for her husband was in any manner alienated, there was nothing warranting submitting this second alleged cause of action. While loss of affection might increase the damage, yet the facts testified to would constitute an injury forming the basis of an action for damages, even though prior thereto there had existed no affection between respondent and his wife."

⁶ Bl. Comm. book 3, p. 139.

⁷ See *BOLAND v. STANLEY*, 88 Ark. 562, 115 S. W. 163, 129 Am. St. Rep. 114, Chapin Cas. Torts, 263; *Barnes v. Allen*, 1 Abb. Dec. (N. Y.) 111, 1 Keyes, 390; *Powell v. Benthall*, 136 N. C. 145, 48 S. E. 598.

⁸ *Modisett v. McPike*, 74 Mo. 636; *Gilchrist v. Bale*, 8 Watts (Pa.) 355, 34 Am. Dec. 469. Cf. *Corrick v. Dunham* (1910) 147 Iowa, 320, 126 N. W. 150; *Johnson v. Allen*, 100 N. C. 131, 5 S. E. 666.

⁹ *Philp v. Squire*, Peake N. P. 82. Cf. *Barnes v. Allen*, 1 Abb. Dec. (N. Y.) 111, 1 Keyes, 190; *Powell v. Benthall*, 136 N. C. 145, 48 S. E. 598.

¹⁰ *Hutcheson v. Peck*, 5 Johns. (N. Y.) 196, 209, per Kent, C. J. In accord, *BOLAND v. STANLEY*, 88 Ark. 562, 115 S. W. 163, 129 Am.

The husband has likewise a cause of action against one who influences or advises the wife improperly to depart or live separate,¹¹ or who assists in her departure.¹² But here, likewise, one cannot be held accountable where the advice was honestly given,¹³ or the assistance rendered in good faith,¹⁴ especially if he be a parent,¹⁵ or near relative.¹⁶

Adultery

The husband may bring his action for criminal conversation,¹⁷ whether the sexual intercourse was with¹⁸ or without¹⁹ the wife's consent. It matters not that the wife was equally guilty. "It is but the old cowardly excuse set up by the first man, 'The woman gave me of the tree and I did eat.' It did not save from the penalty the first defendant, and cannot under the law save this one."²⁰ Recovery,

St. Rep. 114, Chapin Cas. Torts, 263. Cf. Corrick v. Dunham (1910) 147 Iowa, 320, 126 N. W. 150.

¹¹ BOLAND v. STANLEY, 88 Ark. 562, 115 S. W. 163, 129 Am. St. Rep. 114, Chapin Cas. Torts, 263; Multer v. Knibbs, 193 Mass. 556, 79 N. E. 762, 9 L. R. A. (N. S.) 322, 9 Ann. Cas. 958; Allen v. Forsythe, 160 Mo. App. 262, 142 S. W. 820; Barbee v. Armstead, 32 N. C. 530, 51 Am. Dec. 404; Holtz v. Dick, 42 Ohio St. 23, 51 Am. Rep. 791; Jones v. Monson, 137 Wis. 478, 119 N. W. 179, 129 Am. St. Rep. 1082.

¹² Higham v. Vanosdol, 101 Ind. 160.

¹³ Tasker v. Stanley, 153 Mass. 148, 26 N. E. 417, 10 L. R. A. 468.

¹⁴ Barnes v. Allen, 1 Abb. Dec. (N. Y.) 111, 1 Keyes, 390.

¹⁵ Ray v. Parsons (1915) 183 Ind. 344, 109 N. E. 202; Pooley v. Dutton (1914) 165 Iowa, 745, 147 N. W. 154; Hostetter v. Green, 150 Ky. 551, 150 S. W. 652; Oakman v. Belden, 94 Me. 280, 47 Atl. 553, 80 Am. St. Rep. 396; Hutcheson v. Peck, 5 Johns. (N. Y.) 196; Beisel v. Gerlach, 221 Pa. 232, 70 Atl. 721, 18 L. R. A. (N. S.) 516.

¹⁶ Baird v. Carle, 157 Wis. 565, 147 N. W. 834 (brother).

¹⁷ In England by 20 & 21 Vict. § 59, actions for criminal conversation are abolished, but by sections 28 and 33 the husband, in a proceeding for dissolution or separation, may recover damages against the adulterer.

¹⁸ Bedan v. Turney, 99 Cal. 649, 34 Pac. 442; Yundt v. Hartrunft, 41 Ill. 9; Moore v. Hammons, 119 Ind. 510, 21 N. E. 1111; Powell v. Strickland, 163 N. C. 393, 79 S. E. 872, Ann. Cas. 1915B, 709.

¹⁹ Bigaouette v. Paulet, 134 Mass. 123, 45 Am. Rep. 307; Egbert v. Greenwalt, 44 Mich. 245, 6 N. W. 654, 38 Am. Rep. 260; Jacobsen v. Siddal, 12 Or. 280, 7 Pac. 108, 53 Am. Rep. 360.

²⁰ Sleber v. Pettit, 200 Pa. 58, 69, 49 Atl. 763, per Dean, J.

it is held, may be allowed, though the husband is living apart from his wife,²¹ even though the separation be due to his fault. "The policy of the law encourages them, if living apart, to come together again. Reconciliation would or should be followed by purity in their marriage relation and happiness in their home. If, while separated, she is debauched, the hope of reconciliation is thereby greatly diminished and may be wholly extinguished."²² "Recrimination is not a defense to this action, as in a proceeding for divorce."²³

It is usual to allege and prove alienation of affection and loss of companionship and service; but it is unnecessary to do so except by way of aggravation. "The essential injury to the husband consists in the defilement of the marriage bed, in the invasion of his exclusive right to marital intercourse with his wife and to beget his own children. This presumes the loss of the consortium with his wife, of comfort in her society in that respect in which his right is peculiar and exclusive."²⁴ That defendant was unaware that the woman was married is no defense,²⁵ nor that the husband forgave the wife for this²⁶ or other misconduct.²⁷ His consent to or connivance at the seduction of which he complains will bar his action,²⁸ but not consent to or con-

²¹ Michael v. Dunkle, 84 Ind. 544, 43 Am. Rep. 100; Evans v. Evans, 68 L. J. (Prob. Adm. & Div. Div.) 70. See Prettyman v. Williamson, 1 Pennewill (Del.) 224, 39 Atl. 731; Bigaouette v. Paulet, 134 Mass. 123, 45 Am. Rep. 307. Whether there may be a renunciation of marital rights *quære*. See Sherwood v. Titman, 55 Pa. 77.

²² Cross v. Grant, 62 N. H. 675, 686, 13 Am. St. Rep. 607, per Smith, J.

²³ Browning v. Jones, 52 Ill. App. 597, 604.

²⁴ Bigaouette v. Paulet, 134 Mass. 123, 125, 45 Am. Rep. 307, per Allen, J. In accord, Stark v. Johnson (1908) 43 Colo. 243, 95 Pac. 930, 16 L. R. A. (N. S.) 674, 127 Am. St. Rep. 114, 15 Ann. Cas. 868.

²⁵ Wales v. Miner, 89 Ind. 118; Lord v. Lord, [1900] L. R. 297, 67 L. J. P. 54.

²⁶ Smith v. Hockenberry, 146 Mich. 7, 109 N. W. 23, 117 Am. St. Rep. 615, 10 Ann. Cas. 60. Cf. Smith v. Meyers, 52 Neb. 70, 71 N. W. 1006.

²⁷ Clouser v. Clapper, 59 Ind. 548. Cf. Shannon v. Swanson, 208 Ill. 52, 69 N. E. 869.

²⁸ Prettyman v. Williamson, 1 Pennewill (Del.) 224, 39 Atl. 731;

nivance at the wife's intimacy with other men, though the latter will go in mitigation of damages.²⁹

In assessing damages, the jury may consider the outraged feelings of the husband, and include in its award compensation for his humiliation.³⁰

Injury to the Wife's Person

At common law the husband might sue for loss of companionship and services—the result of a personal injury to the wife due to the unlawful act or omission of another—and for such expense as her illness may have forced upon him. This right by the weight of authority he still possesses,³¹ but it has been held that, under statutes regulating her status, the married woman may sue for the diminution or destruction of her capacity to assist and serve her husband, her right of recovery being regarded as exclusive, except as to such expenses as the husband may have incurred.³² In states where the wife is given the right to her own earnings and is permitted to sue in her own name for injuries to her person, but in which the common-law right of the husband to recover for loss of services is still preserved, a distinction must be drawn between the services of the wife in the household in the discharge of her do-

Morning v. Long, 109 Iowa, 288, 80 N. W. 390; *Kohlhoss v. Mobley*, 102 Md. 199, 62 Atl. 236, 5 Ann. Cas. 865; *Bunnell v. Greathead*, 49 Barb. (N. Y.) 106.

²⁹ *Sanborn v. Nellson*, 4 N. H. 501.

³⁰ *Johnston v. Disbrow*, 47 Mich. 59, 10 N. W. 79; *Smith v. Meyers*, 52 Neb. 70, 71 N. W. 1006.

³¹ *Little Rock Gas & Fuel Co. v. Coppedge* (1915) 116 Ark. 334, 172 S. W. 885; *Mageau v. Great Northern Ry. Co.*, 103 Minn. 290, 115 N. W. 651, 946, 15 L. R. A. (N. S.) 511, 14 Ann. Cas. 551; *Booth v. Manchester St. Ry.*, 73 N. H. 529, 63 Atl. 578; *Lyons v. New York City R. Co.*, 49 Misc. Rep. 517, 97 N. Y. Supp. 1033. Thus the husband may recover against one who sells laudanum to the wife, knowing that she was using it as a beverage to the impairment of her health. *Hoard v. Beck*, 56 Barb. (N. Y.) 202; *Holleman v. Harward*, 119 N. C. 150, 25 S. E. 972, 34 L. R. A. 803, 56 Am. St. Rep. 672.

³² *Marri v. Stamford St. R. Co.*, 84 Conn. 9, 78 Atl. 582, 33 L. R. A. (N. S.) 1042, Ann. Cas. 1912B, 1120. Cf. *Bolger v. Boston Elevated Ry. Co.*, 205 Mass. 420, 91 N. E. 389; *Hamilton v. Great Falls St. Ry. Co.*, 17 Mont. 334, 351, 42 Pac. 860, 43 Pac. 713.

mestic duties, which belong to the husband, for the loss of which he may sue, and such services as she may render to another, for, since whatever she here earns belongs to her, she alone can recover for disability to perform them.⁸³ The test of her right to damages for impairment of capacity and loss of time would therefore appear to be "whether she was in the employment of persons other than her husband on her own account or carrying on some business in her own behalf."⁸⁴

It would seem, however, somewhat illogical to hold that, though she is permitted to labor independently and retain the fruits, no allowance can be made for her diminished capacity merely because she was not in fact engaged in a separate employment at the time the injury was received.⁸⁵

Alienation of Affections

Sexual intercourse is not here a necessary element, though it may constitute aggravation. "The pith of the action for the alienation of affections of the wife is the loss of her society, of *consortium*, by the husband without justifiable reason."⁸⁶ Nor need there have been an abandonment. "The alienation of the wife's affections, for which the law gives redress, may be accomplished, notwithstanding her

⁸³ *Townsend v. Wilmington City Ry. Co.* (Del. 1907) 7 Pennewill, 255, 78 Atl. 635; *City of Wyandotte v. Agan*, 37 Kan. 528, 15 Pac. 529; *Gregory v. Oakland Motor Car Co.* (1914) 181 Mich. 101, 147 N. W. 614; *Libaire v. Minneapolis & St. L. R. Co.* (1911) 113 Minn. 517, 130 N. W. 8; *Brooks v. Schwerin*, 54 N. Y. 343.

⁸⁴ *Fleming v. Town of Shenandoah*, 67 Iowa, 505, 508, 25 N. W. 752, 56 Am. Rep. 354; In accord, *Denver & R. G. R. Co. v. Young*, 30 Colo. 349, 70 Pac. 688; *Central City v. Engle*, 65 Neb. 885, 91 N. W. 849; *Healey v. Ballantine & Sons*, 66 N. J. Law, 339, 49 Atl. 511; *Corbin v. City of Huntington* (1914) 74 W. Va. 479, 82 S. E. 323.

⁸⁵ Cf. *Colorado Springs & I. Ry. Co. v. Nichols* (1907) 41 Colo. 272, 92 Pac. 691, 20 L. R. A. (N. S.) 215; *Withey v. Fowler* (1914) 164 Iowa, 377, 145 N. W. 923.

⁸⁶ *Weston v. Weston*, 86 App. Div. 159, 161, 83 N. Y. Supp. 528. In accord, *Callis v. Merrieweather*, 98 Md. 361, 57 Atl. 201, 103 Am. St. Rep. 404; *Rinehart v. Bills*, 82 Mo. 534, 52 Am. Rep. 385; *Ireland v. Ward* (1908) 51 Or. 102, 93 Pac. 932. Cf. *Ex parte Warfield*, 40 Tex. Cr. R. 413, 50 S. W. 933, 76 Am. St. Rep. 724 (injunction issued against conversing or associating with the wife or writing to her).

continued residence under her husband's roof,"³⁷ for it has been well said that remaining with the husband "would rather add the provocation of insult to the keenness of suffering. It would continue before him a present, living, irritating, aggravating, if not consuming, source of grief, which even her absence might in a measure relieve."³⁸ There need not have been a total alienation of affections. It is sufficient, though it be but partial.³⁹ "Even though there be an estrangement between husband and wife, this does not give license to an outsider to invade that home and broaden the breach between them."⁴⁰ But an action is not maintainable where the wife has voluntarily given her affections to another, the latter having done nothing to win them.⁴¹ It must be established that defendant is the enticer.⁴² As in the case of enticing, the general rule "is that parents may advise their children about their domestic affairs without incurring liability, if the advice be given in good faith and prompted by worthy motives, even though such advice results in a separation and estrangement of husband and wife."⁴³ Similar protection should be

³⁷ *Rinehart v. Bills*, 82 Mo. 534, 538, 52 Am. Rep. 385.

³⁸ *Heermance v. James*, 47 Barb. (N. Y.) 120, 126, per Potter, J. But see *Houghton v. Rice*, 174 Mass. 366, 54 N. E. 843, 47 L. R. A. 310, 75 Am. St. Rep. 351.

³⁹ *Fratini v. Caslini*, 66 Vt. 273, 29 Atl. 252, 44 Am. St. Rep. 843.

⁴⁰ *Philpott v. Kirkpatrick*, 171 Mich. 495, 506, 137 N. W. 232, per Stone, J.

⁴¹ There is thus a pronounced distinction between suits for alienation and criminal conversation. "In the latter the fact of adultery is all-important, and the fact of which of the guilty parties was the seducer is unimportant; while in the former the crucial issue is whether the defendant enticed the wife, alienated her affections, and injected himself between husband and wife to the destruction of their mutual happiness." *De Ford v. Johnson*, 152 Mo. App. 209, 214, 133 S. W. 393. Cf. *White v. Ross*, 47 Mich. 172, 10 N. W. 188.

⁴² *Scott v. O'Brien* (1908) 129 Ky. 1, 110 S. W. 260, 16 L. R. A. (N. S.) 742, 130 Am. St. Rep. 419 (action by wife). Cf. *Saxton v. Barber* (1914) 71 Or. 230, 139 Pac. 334.

⁴³ *Ratcliffe v. Walker* (1915) 117 Va. 569, 85 S. E. 575, 578, per Kelly, J. In accord, *Heisler v. Heisler*, 151 Iowa, 503, 131 N. W. 676; *Oakman v. Belden*, 94 Me. 280, 47 Atl. 553, 80 Am. St. Rep. 396; *Zimmerman v. Whiteley*, 134 Mich. 39, 95 N. W. 989; *Belsel v. Gerlach*, 221 Pa. 232, 70 Atl. 721, 18 L. R. A. (N. S.) 516.

accorded to other near relatives.⁴⁴ But even a parent may not interfere willfully and maliciously to bring about a separation.⁴⁵

INJURIES TO THE WIFE

96. At common law the wife had no legal right to consortium. Such right is now generally recognized. But acts which would constitute a tort against the husband will not necessarily give her a cause of action; e. g., criminal conversation.

At common law no action was maintainable by the wife against one who had enticed the husband or alienated his affections.⁴⁶ It was impossible for her to sue alone, and the husband could not well be joined to recover for an injury which he assisted in causing.⁴⁷ But to this modern courts have answered that, "whatever inequalities of right as to property may result from the marriage contract, husband and wife are equal in rights in one respect, namely, each owes to the other the fullest possible measure of conjugal affection and society; the husband to the wife all that the wife owes to him. Upon principle, this right in the wife is equally valuable to her, as property, as is that of the husband to him."⁴⁸ Moreover, the technical objec-

⁴⁴ Cf. *Miller v. Miller*, 154 Iowa, 344, 134 N. W. 1058 (sister); *Lulck v. Arends*, 21 N. D. 614, 132 N. W. 353 (plaintiff's and defendant's wives were half-sisters); *Baird v. Carle*, 157 Wis. 565, 147 N. W. 834 (brother).

⁴⁵ *Allen v. Forsythe* (1912) 160 Mo. App. 262, 142 S. W. 820; *Ratcliffe v. Walker* (1915) 117 Va. 569, 85 S. E. 575; *Jones v. Monson*, 137 Wis. 478, 119 N. W. 179, 129 Am. St. Rep. 1082.

⁴⁶ *Westlake v. Westlake*, 34 Ohio St. 621, 32 Am. Rep. 397, note; *Duffles v. Duffles*, 76 Wis. 374, 45 N. W. 522, 8 L. R. A. 420, 20 Am. St. Rep. 79; *Crocker v. Crocker* (C. C.) 98 Fed. 702.

⁴⁷ See *Bassett v. Bassett*, 20 Ill. App. 543; *Haynes v. Nowlin*, 129 Ind. 581, 29 N. E. 389, 14 L. R. A. 787, 28 Am. St. Rep. 213; *Hodge v. Wetzler*, 69 N. J. Law, 490, 55 Atl. 49; *FLANDERMEYER v. COOPER*, 85 Ohio St. 327, 98 N. E. 102, 40 L. R. A. (N. S.) 360, Ann. Cas. 1913A, 983, Chapin Cas. Torts, 267; *Smith v. Smith*, 98 Tenn. 101, 38 S. W. 439, 60 Am. St. Rep. 838.

⁴⁸ *Foot v. Card*, 58 Conn. 1, 8, 18 Atl. 1027, 6 L. R. A. 829, 18 Am.

tion growing out of the necessity of joining the husband ⁴⁹ has generally been deemed swept away by modern legislation permitting married women to sue and securing their separate property rights.⁵⁰ Here the law will extend the

St. Rep. 258, per Pardee, J. In accord, *Price v. Price*, 91 Iowa, 693, 60 N. W. 202, 29 L. R. A. 150, 51 Am. St. Rep. 360; *Lockwood v. Lockwood*, 67 Minn. 476, 70 N. W. 784; *Bennett v. Bennett*, 116 N. Y. 584, 23 N. E. 17, 6 L. R. A. 553; *FLANDERMEYER v. COOPER*, 85 Ohio St. 327, 98 N. E. 102, 40 L. R. A. (N. S.) 360, Ann. Cas. 1913A, 983, Chapin Cas. Torts, 267; *Gerner v. Gerner*, 185 Pa. 233, 39 Atl. 884, 40 L. R. A. 549, 64 Am. St. Rep. 646; *Knapp v. Wing*, 72 Vt. 334, 47 Atl. 1075. Contra, *Morgan v. Martin*, 92 Me. 190, 42 Atl. 354; *Neville v. Gile*, 174 Mass. 305, 54 N. E. 841; *Houghton v. Rice*, 174 Mass. 366, 54 N. E. 843, 47 L. R. A. 310, 75 Am. St. Rep. 351 (but see *Nolin v. Pearson*, 191 Mass. 283, 77 N. E. 890, 4 L. R. A. [N. S.] 643, 114 Am. St. Rep. 605, 6 Ann. Cas. 658); *Lonstorf v. Lonstorf*, 118 Wis. 159, 95 N. W. 961; *Duffles v. Duffles*, 76 Wis. 374, 45 N. W. 522, 8 L. R. A. 420, 20 Am. St. Rep. 79.

⁴⁹ This necessity was denied in *Foot v. Card*, supra; Pardee, J., saying: "There are good reasons for the rule that the husband should join in a complaint for damages resulting from an injury to the person, property, reputation, or feelings of the wife in every case other than that before us. Whenever in any of these she suffers, presumably he suffers, he has a direct pecuniary interest in the result, and the defendant is entitled to protection from a second judgment. But in the case before us it is the pith and marrow of the complaint that in alienating the husband's conjugal affection from the wife, in inducing him to deny his conjugal society to her, in persuading him to give his adulterous affections and society to the defendant, the latter has inflicted upon the plaintiff an injury by which, from the nature of the case, it is impossible for the husband to suffer injury, for which it is impossible for him to ask redress either for himself or for his wife. To ask in his name would be to plant the seeds of death in the cause at the outset, and the law does not compel those who have suffered wrong so to ask for redress as to insure denial."

⁵⁰ *Haynes v. Nowlin*, 129 Ind. 581, 29 N. E. 389, 14 L. R. A. 787, 28 Am. St. Rep. 213; *Price v. Price*, 91 Iowa, 693, 60 N. W. 202, 29 L. R. A. 150, 51 Am. St. Rep. 360; *Warren v. Warren*, 89 Mich. 123, 50 N. W. 842, 14 L. R. A. 545; *Lockwood v. Lockwood*, 67 Minn. 476, 70 N. W. 784; *Sims v. Sims*, 79 N. J. Law, 577, 76 Atl. 1063, 29 L. R. A. (N. S.) 842; *Bennett v. Bennett*, 116 N. Y. 584, 23 N. E. 17, 6 L. R. A. 553; *Westlake v. Westlake*, 34 Ohio St. 621, 32 Am. Rep. 397n; *Gerner v. Gerner*, 185 Pa. 233, 39 Atl. 884, 40 L. R. A. 549, 64 Am. St. Rep. 646. But see *Lonstorf v. Lonstorf*, 118 Wis. 159, 95 N. W. 961.

same favor to honest advice and protection,⁵¹ particularly when given by parents⁵² or near relatives,⁵³ that is accorded where the action is brought by the husband. Logically it would seem that there can be no recovery by the wife for criminal conversation with the husband where the latter's affections have not been alienated. The husband is permitted to sue because of the disgrace attaching to him, and no such disgrace has ever rested upon the wife, "and, of more importance, the danger that a wife's infidelity might not only impose on her husband the support of children not his own, but, still worse, cast discredit upon the legitimacy of those really begotten by him." These reasons are not involved in a similar action brought by the wife.⁵⁴ Nor, where there has been an injury to the husband's person, may the wife recover for the deprivation of support and *consortium* during his illness,⁵⁵ though it is difficult to understand why this should be so at the present time, if, as many courts have said, the right which the wife has in the *consortium* of the husband is equal to that which the husband has in the *consortium* of the wife.⁵⁶

⁵¹ *Geromini v. Brunelle*, 214 Mass. 492, 102 N. E. 67, 46 L. R. A. (N. S.) 465. Cf. *Powers v. Sumbler*, 83 Kan. 1, 110 Pac. 97.

⁵² *Heisler v. Heisler*, 151 Iowa, 503, 131 N. W. 676; *Tucker v. Tucker*, 74 Miss. 93, 19 South. 955, 32 L. R. A. 623; *Fronk v. Fronk*, 159 Mo. App. 543, 141 S. W. 692; *Pollock v. Pollock*, 9 Misc. Rep. 82, 29 N. Y. Supp. 37; *Brown v. Brown*, 124 N. C. 19, 32 S. E. 320, 70 Am. St. Rep. 574; *Gernerdt v. Gernerdt*, 185 Pa. 233, 39 Atl. 884, 40 L. R. A. 549, 64 Am. St. Rep. 646.

⁵³ *Trumbull v. Trumbull*, 71 Neb. 186, 98 N. W. 683, 8 Ann. Cas. 812.

⁵⁴ *Kroessin v. Keller*, 60 Minn. 372, 374, 62 N. W. 438, 27 L. R. A. 685, 51 Am. St. Rep. 533, per Collins, J. In accord, *Doe v. Roe*, 82 Me. 503, 20 Atl. 83, 8 L. R. A. 833, 17 Am. St. Rep. 499. Cf. *Hodecker v. Stricker* (Sup.) 39 N. Y. Supp. 515. But see *Hart v. Knapp*, 76 Conn. 135, 55 Atl. 1021, 100 Am. St. Rep. 989; *Nolin v. Pearson*, 191 Mass. 283, 77 N. E. 890, 4 L. R. A. (N. S.) 643, 114 Am. St. Rep. 605, 6 Ann. Cas. 658.

⁵⁵ *Brown v. Kistleman* (1912) 177 Ind. 692, 98 N. E. 631, 40 L. R. A. (N. S.) 236; *Goldman v. Cohen*, 30 Misc. Rep. 336, 63 N. Y. Supp. 459; Bl. Comm. vol. 3, p. 143. See *Feneff v. New York Cent. & H. R. R. Co.*, 203 Mass. 278, 89 N. E. 436, 24 L. R. A. (N. S.) 1024, 133 Am. St. Rep. 291.

⁵⁶ Cf. *FLANDERMEYER v. COOPER*, 85 Ohio St. 327, 98 N. E.

INJURIES TO THE PARENT

97. The parent may recover against one who has unlawfully interfered with his right to the child's services. But, though required to establish a master's right in order to recover, when he has done so, compensation in many cases will be awarded him as parent.

For abducting,⁵⁷ enticing,⁵⁸ or harboring⁵⁹ a minor child, the law gives to the parent a cause of action. But defendant must have employed force, or have acted willfully and with knowledge of the parent's rights.⁶⁰ The parent may likewise recover against one who has unlawfully caused physical injury, resulting in disability to labor.⁶¹ Though it has been held that the cause of action is founded on

102, 40 L. R. A. (N. S.) 360, Ann. Cas. 1913A, 983, Chapin Cas. Torts, 267, where a wife was allowed recovery against one who sold morphine to the husband with knowledge that the latter's mind was being weakened thereby.

⁵⁷ Washburn v. Abrams, 122 Ky. 53, 90 S. W. 997; Rice v. Nickerson, 9 Allen (Mass.) 478, 85 Am. Dec. 777; Magee v. Holland, 27 N. J. Law, 86, 72 Am. Dec. 341; Howell v. Howell, 162 N. C. 283, 78 S. E. 222, 45 L. R. A. (N. S.) 867, Ann. Cas. 1914A, 893; Wheeler v. Price, 21 R. I. 99, 41 Atl. 894.

⁵⁸ Hills v. Hobert, 2 Root (Conn.) 48. But plaintiff must establish inducement or solicitation by defendant. Kenny v. Baltimore & Ohio R. Co., 101 Md. 490, 61 Atl. 581, 1 L. R. A. (N. S.) 205; Arnold v. St. Louis & S. F. R. Co., 100 Mo. App. 470, 74 S. W. 5; Caughey v. Smith, 47 N. Y. 244.

⁵⁹ Everett v. Sherfey, 1 Iowa, 356; Washburn v. Abrams, 122 Ky. 53, 90 S. W. 997; Stowe v. Heywood, 7 Allen (89 Mass.) 118; Sargent v. Mathewson, 38 N. H. 54; Caughey v. Smith, 47 N. Y. 244.

⁶⁰ BUTTERFIELD v. ASHLEY, 6 Cush. (Mass.) 249, Chapin Cas. Torts, 272; Caughey v. Smith, 47 N. Y. 244; Somboy v. Loring, Fed. Cas. No. 13,168.

⁶¹ King v. Southern Ry. Co., 126 Ga. 794, 55 S. E. 965, 8 L. R. A. (N. S.) 544; Kennard v. Burton, 25 Me. 39, 43 Am. Dec. 249; Tornroos v. R. H. White Co., 220 Mass. 336, 107 N. E. 1015; Cuming v. Brooklyn City R. Co., 109 N. Y. 95, 16 N. E. 65; Id., 21 Abb. N. C. (N. Y.) 1. In Tidd v. Skinner, 171 App. Div. 98, 156 N. Y. Supp. 885,

actual loss of services,⁶² the more reasonable and equitable doctrine permits the parent, having a right to the services, who has been put to necessary expense in the care and cure of the child, to maintain his action, although no services were in fact being rendered at the time.⁶³

The right to services may likewise be infringed by the seduction of the child. On principle, the action would appear to lie, irrespective of the child's sex,⁶⁴ though no case has been found which deals with the seduction of a male. The daughter's incapacity to labor must be the proximate result of the connection, though pregnancy is not essential. The same effect might be produced by venereal disease,⁶⁵ or other causes created by the intercourse.⁶⁶ If, however,

a mother was allowed recovery against a druggist for loss of services of her minor son, who became an habitual drug user by reason of long-continued sales of heroin to him.

⁶² *Kenney v. Baltimore & Ohio R. Co.*, 101 Md. 490, 61 Atl. 581, 1 L. R. A. (N. S.) 205 (enticement); *Magee v. Holland*, 27 N. J. Law, 86, 72 Am. Dec. 341 (abduction). This would appear to be the English rule. *Grinnell v. Wells*, 2 D. & L. 610, 8 Jur. 1101, 14 L. J. C. P. 19, 7 M. & G. 1033, 8 Scott, N. R. 741, 49 E. C. L. 1033 (seduction).

⁶³ *Durden v. Barnett & Harris*, 7 Ala. 169 (personal injuries); *Sykes v. Lawlor*, 49 Cal. 236 (personal injuries); *Washburn v. Abrams*, 122 Ky. 53, 90 S. W. 997 (detention); *Dennis v. Clark*, 2 Cush. (Mass.) 347, 48 Am. Dec. 671 (personal injuries); *Rice v. Norfolk Southern R. Co.*, 167 N. C. 1, 82 S. E. 1034 (malarial fever). See *Franklin v. Butcher* (1910) 144 Mo. App. 660, 129 S. W. 428; *Cum-ling v. Brooklyn City R. Co.*, 109 N. Y. 95, 16 N. E. 65; *Id.*, 21 Abb. N. C. (N. Y.) 1. This applies where the rendition of services was impossible because of the child's extreme youth. *Clark v. Bayer*, 32 Ohio St. 299, 30 Am. Rep. 593 (infant under five); *Netherland-American Steam Nav. Co. v. Hollander*, 59 Fed. 417, 8 C. C. A. 169 (infant under five). It is immaterial that the child was not actually a member of the parent's household, provided there existed a right to recall him or her to custody and service. *Hare v. Dean*, 90 Me. 308, 38 Atl. 227.

⁶⁴ "Nor in my judgment does the remedy depend upon the sex of the servant. The debased woman, who lures to her vile embrace an innocent boy and infects him with loathsome disease, is equally liable to this action, if an injury to his master's right to service follow from her crime." *White v. Nellis*, 31 N. Y. 405, 409, 88 Am. Dec. 282, per Davis, J.

⁶⁵ *White v. Nellis*, 31 N. Y. 405, 88 Am. Dec. 282.

⁶⁶ *Abrahams v. Kidney*, 104 Mass. 222, 6 Am. Rep. 220; *Manvell v.*

the loss of health is due to mental suffering, not the consequence of the seduction, but the result of subsequent intervening causes, such an abandonment by the seducer,⁶⁷ or shame resulting from exposure,⁶⁸ it is too remote, and the action is not maintainable.

Where the daughter is under age and resides with her father, loss of service will be presumed. "Acts of service by the daughter are not necessary; it is enough that the parent has a right to command them."⁶⁹ This is so where she resides elsewhere, or is in the service of another, if the parent has not relinquished past the power of recall a right to control her services,⁷⁰ and no waiver or relinquishment fraudulently obtained will bar his action.⁷¹ If the daughter be of age, it is essential that she be in the father's service.⁷² It is not necessary, however, to make proof of an actual contract between them; for, if service is shown to have been rendered to the father, a contract will be inferred, and it matters not how trivial the service may have been. "Though it may have consisted but in pouring out his tea, he is entitled to his action."⁷³ Nor will recovery be denied

Thompson, 2 Carr. & P. 303 (criticized in *Knight v. Wilcox*, 14 N. Y. 413, 417). Cf. *LAWYER v. FRITCHER*, 130 N. Y. 239, 29 N. E. 267, 14 L. R. A. 700, 27 Am. St. Rep. 521, Chapin Cas. Torts, 274.

⁶⁷ See *Boyle v. Brandon*, 13 M. & W. 738.

⁶⁸ *Knight v. Wilcox*, 14 N. Y. 413.

⁶⁹ *Hewitt v. Prime*, 21 Wend. (N. Y.) 79, 81. In accord, *Anderson v. Ryan*, 3 Gilman (8 Ill.) 583; *Barbour v. Stephenson* (C. C.) 32 Fed. 66. Cf. *Middleton v. Nichols*, 62 N. J. Law, 636, 43 Atl. 575.

⁷⁰ *Simpson v. Grayson*, 54 Ark. 404, 16 S. W. 4, 26 Am. St. Rep. 52; *White v. Murtland*, 71 Ill. 250, 22 Am. Rep. 100; *Greenwood v. Greenwood*, 28 Md. 370; *Ellington v. Ellington*, 47 Miss. 329; *Furman v. Van Sise*, 56 N. Y. 435, 15 Am. Rep. 441; *Lavery v. Crooke*, 52 Wis. 612, 9 N. W. 599, 38 Am. Rep. 768. Cf. *Blanchard v. Ilsley*, 120 Mass. 487, 21 Am. Rep. 535; *Fitzgerald v. Connors*, 88 Vt. 365, 92 Atl. 456.

⁷¹ *Ball v. Bruce*, 21 Ill. 161; *LAWYER v. FRITCHER*, 130 N. Y. 239, 29 N. E. 268, 14 L. R. A. 700, 27 Am. St. Rep. 521, Chapin Cas. Torts, 274.

⁷² *Patterson v. Thompson*, 24 Ark. 55; *Beaudette v. Gagne*, 87 Me. 534, 33 Atl. 23; *Thompson v. Millar*, 1 Wend. (N. Y.) 448; *Lee v. Hodges*, 13 Grat. (54 Va.) 726; *Hudkins v. Haskins*, 22 W. Va. 645.

⁷³ *Briggs v. Evans*, 27 N. C. 16, 20. In accord, *Herring v. Jester*, 2 Houst. (7 Del.) 66; *Ball v. Bruce*, 21 Ill. 161; *Kendrick v. Mc-*

merely because she was temporarily absent from his home at the time when intercourse took place.⁷⁴

As there can be no action for interference with parental rights, however accomplished, unless the father had at the time the power of controlling the child's services, proof of their loss or relinquishment by emancipation, express or implied,⁷⁵ by apprenticing the child to another,⁷⁶ or otherwise,⁷⁷ will constitute a bar. Primarily the right of action is in the father,⁷⁸ and only after his death is it in the mother.⁷⁹ But where, because of her husband's desertion, she has in fact the sole custody and control of the child, she has been permitted to recover, though the father be liv-

Crary, 11 Ga. 603; *Badgley v. Decker*, 44 Barb. (N. Y.) 577; *Villepigue v. Shular*, 3 Strob. (34 S. C.) 462.

⁷⁴ *Lipe v. Eisenlerd*, 32 N. Y. 229; *Hudkins v. Haskins*, 22 W. Va. 645.

⁷⁵ *Chesapeake & O. Ry. Co. v. De Atley*, 151 Ky. 109, 151 S. W. 363 (personal injuries); *McCarthy v. Boston & Lowell R. Corp.*, 148 Mass. 550, 20 N. E. 182, 2 L. R. A. 608 (personal injuries); *Daly v. Everett Pulp & Paper Co.*, 31 Wash. 252, 71 Pac. 1014 (personal injuries); *Ogborn v. Francis*, 44 N. J. Law, 441, 43 Am. Rep. 394; *Swift & Co. v. Johnson*, 138 Fed. 867, 71 C. C. A. 619, 1 L. R. A. (N. S.) 1161.

⁷⁶ *Dain v. Wycoff*, 7 N. Y. 191 (seduction). Contra, where the defendant fraudulently procured the daughter to enter into his service. See *supra*, p. 469.

⁷⁷ *Roberts v. Connelly*, 14 Ala. 235 (seduction); *White v. Murtland*, 71 Ill. 250, 22 Am. Rep. 100 (seduction); *Wodell v. Coggeshall*, 2 Metc. (Mass.) 89, 35 Am. Dec. 391 (enticement); *McGarr v. National & Providence Worsted Mills*, 24 R. I. 447, 53 Atl. 320, 60 L. R. A. 122, 96 Am. St. Rep. 749 (personal injuries).

⁷⁸ *King v. Southern Ry. Co.*, 126 Ga. 794, 55 S. E. 965, 8 L. R. A. (N. S.) 544 (personal injuries); *Washburn v. Abrams*, 122 Ky. 53, 90 S. W. 997 (abduction); *Ackeret v. City of Minneapolis* (1915) 129 Minn. 190, 151 N. W. 976, L. R. A. 1915D, 1111 (personal injuries); *Keller v. City of St. Louis*, 152 Mo. 596, 54 S. W. 438, 47 L. R. A. 391 (personal injuries); *Scarlett v. Norwood*, 115 N. C. 284, 20 S. E. 459 (seduction).

⁷⁹ *Washburn v. Abrams*, 122 Ky. 53, 90 S. W. 997 (abduction); *Horgan v. Pacific Mills*, 158 Mass. 402, 33 N. E. 581, 35 Am. St. Rep. 504 (personal injuries); *Franklin v. Butcher* (1910) 144 Mo. App. 660, 129 S. W. 428 (smallpox communicated to child); *Furman v. Van Sise*, 56 N. Y. 435, 15 Am. Rep. 441 (seduction); *Villepigue v. Shular*,

ing.⁸⁰ If both parents are dead,⁸¹ or even though one⁸² or both be living,⁸³ a third party may stand *in loco parentis*, who may be in a position to sue.

Damages

"The theory of an injury to a master is pertinaciously retained as the essential basis of the father's action, but it is now little more than a legal fiction, used as a peg to hang a substantial award of damages upon as compensation, not to the master, but to the head of the family."⁸⁴ The plaintiff "comes into the court as a master; he goes before the jury as a father."⁸⁵ Hence he may not only recover for the loss of services, actual⁸⁶ or prospective,⁸⁷ for expenses

3 Strob. (34 S. C.) 462 (seduction). Cf. Parker v. Meek, 3 Sneed (35 Tenn.) 29.

⁸⁰ Malone v. Topfer, 125 Md. 157, 93 Atl. 397 (seduction); Tornroos v. R. H. White Co., 220 Mass. 336, 107 N. E. 1015 (personal injuries); Yost v. Grand Trunk Ry. Co., 163 Mich. 564, 128 N. W. 784, 31 L. R. A. (N. S.) 519, Ann. Cas. 1912A, 988 (personal injuries); Badgley v. Decker, 44 Barb. (N. Y.) 577 (seduction); O'Brien v. City of Philadelphia, 215 Pa. 407, 64 Atl. 551 (personal injuries). Cf. McGarr v. National & Providence Worsted Mills, 24 R. I. 447, 53 Atl. 320, 60 L. R. A. 122, 96 Am. St. Rep. 749 (personal injuries).

⁸¹ Ball v. Bruce, 21 Ill. 161 (brother-in-law); Davidson v. Goodall, 18 N. H. 423 (cousin); Certwell v. Hoyt, 6 Hun (N. Y.) 575 (grandfather); Manvell v. Thomson, 2 Carr. & P. 303 (uncle).

⁸² Tittlebaum v. Boehmcke, 81 N. J. Law, 697, 80 Atl. 323, 35 L. R. A. (N. S.) 1062, Ann. Cas. 1912D, 298 (husband of mother of illegitimate child); Maguinay v. Saudek, 5 Sneed (37 Tenn.) 146 (stepfather).

⁸³ Clark v. Bayer, 32 Ohio St. 299, 30 Am. Rep. 593 (grandfather). Cf. Blanchard v. Ilsley, 120 Mass. 487, 21 Am. Rep. 535.

⁸⁴ Simpson v. Grayson, 54 Ark. 404, 406, 16 S. W. 4, 26 Am. St. Rep. 52, per Cockrill, C. J.

⁸⁵ Briggs v. Evans, 27 N. C. 16, 20, per Nash, J.

⁸⁶ Travers v. Hartman (Del. 1914) 92 Atl. 855 (personal injuries); Bundy v. Dodson, 28 Ind. 295 (enticement); Koenke v. Bauer, 162 Mo. App. 718, 145 S. W. 506 (seduction); Tillmore v. Moore (D. C.) 4 Fed. 231 (detention).

⁸⁷ Wennell v. Dowson, 88 Conn. 710, 92 Atl. 663 (personal injuries); Travers v. Hartman (Del. 1914) 92 Atl. 855 (personal injuries); Cuming v. Brooklyn City R. Co., 109 N. Y. 95, 16 N. E. 65; Id., 21 Abb. N. C. (N. Y.) 1 (personal injuries). But in an action for enticement the parent can only recover for loss of service up to the

necessarily incurred in the cure and care⁸⁸ and in recovering possession of the child,⁸⁹ but also for mental suffering,⁹⁰ and, where a daughter has been seduced, for the dishonor and disgrace which he has endured.⁹¹ But there can be no recovery for mental distress suffered by the parent, where his action is based upon physical injuries to the child. It is regarded as too speculative and uncertain.⁹²

time of the commencement of the action, or at most to the time of trial. *Covert v. Gray*, 34 How. Prac. (N. Y.) 450.

⁸⁸ *Travers v. Hartman* (Del. 1914) 92 Atl. 855 (personal injuries); *Dennis v. Clark*, 2 Cush. (Mass.) 347, 48 Am. Dec. 671 (personal injuries); *Comer v. Taylor*, 82 Mo. 341 (seduction); *Clark v. Bayer*, 32 Ohio St. 299, 30 Am. Rep. 593 (abduction); *Tillmore v. Moore* (D. C.) 4 Fed. 231 (detention). But only expenses actually incurred or immediately necessary to be incurred. *Cuming v. Brooklyn City R. Co.* 109 N. Y. 95, 16 N. E. 65; *Id.*, 21 Abb. N. C. (N. Y.) 1.

⁸⁹ *Rice v. Nickerson*, 9 Allen (Mass.) 478, 85 Am. Dec. 777 (abduction); *Clark v. Bayer*, 32 Ohio St. 299, 30 Am. Rep. 593 (abduction).

⁹⁰ *Stowe v. Heywood*, 7 Allen (89 Mass.) 118 (harboring); *Russell v. Chambers*, 31 Minn. 54, 16 N. W. 458 (seduction); *Middletown v. Nichols*, 62 N. J. Law, 636, 43 Atl. 575 (seduction); *Rollins v. Chalmers*, 51 Vt. 592 (seduction).

⁹¹ *Herring v. Jester*, 2 Houst. (Del.) 66; *Cook v. Bartlett*, 179 Mass. 576, 61 N. E. 266; *Russell v. Chambers*, 31 Minn. 54, 16 N. W. 458; *Middleton v. Nichols*, 62 N. J. Law, 636, 43 Atl. 575; *Barbour v. Stephenson* (C. C.) 32 Fed. 66.

⁹² *Bube v. Birmingham Ry., Light & Power Co.*, 140 Ala. 276, 37 South. 285, 103 Am. St. Rep. 33; *Covington Street Ry. Co. v. Packer*, 9 Bush (72 Ky.) 455, 15 Am. Rep. 725; *Black v. Carrollton R. Co.*, 10 La. Ann. 33, 63 Am. Dec. 586; *Harford County Com'rs v. Hamilton*, 60 Md. 340, 45 Am. Rep. 739; *Flemington v. Smithers*, 2 C. & P. 292.

INJURIES TO THE MASTER

98. The liability of one who interferes to bring about the breach of a contract of employment is discussed elsewhere.⁹³ It need only be said here that the master may recover for loss of service against the seducer of the servant,⁹⁴ against one whose act or neglect has caused physical injury to the latter,⁹⁵ and against one who has unlawfully confined or imprisoned him.⁹⁶ But the servant has no property in the master, and "is therefore entitled to no action for any battery or imprisonment which such master may happen to endure."⁹⁷

⁹³ See page 444 et seq.

⁹⁴ *Harper v. Luffken*, 7 B. & C. 387; *McKenzie v. Hardinge*, 23 Times L. R. 15. Cf. *Ball v. Bruce*, 21 Ill. 161.

⁹⁵ *Hodsoll v. Stallebrass*, 11 Ad. & El. 301; *Martinez v. Gerber*, 10 L. J. C. P. 314. Loss of service, or impairment of capacity to render service, must be shown. *Fluker v. Georgia R. & B. Co.*, 81 Ga. 461, 8 S. E. 529, 2 L. R. A. 843, 12 Am. St. Rep. 328; *Voss v. Howard*, Fed. Cas. No. 17,013.

⁹⁶ *Woodward v. Washburn*, 3 Denio (N. Y.) 369.

⁹⁷ Bl. Comm. book III, p. 143.

CHAPTER XVIII

THE OBSTRUCTION AND PERVERSION OF LEGAL REMEDIES

- 99. Obstruction of Legal Remedies.
- 100. Perversion of Legal Remedies—Malicious Prosecution.
- 101. Malicious Use and Abuse of Process.
- 102. Unauthorized Suit in Another's Name.
- 103. Maintenance and Champerty.

THE OBSTRUCTION OF LEGAL REMEDIES

99. Under this head will be considered certain cases where the law recognizes a cause of action against one who has impeded or obstructed the enforcement of a fixed and ascertained right.

Many acts constituting an obstruction of justice are crimes both at common law and usually under statute. Such are resistance to an officer while acting in the discharge of his duty or refusal to assist him, dissuading or preventing a witness from testifying or inducing him to give false testimony, embracery, and rescue. So under certain conditions there may be a recovery in a civil action where the enforcement of a legal right has been impeded or prevented.

An important question is whether one who interferes to prevent the collection of a debt can be held accountable to the creditor in an action for damages for the loss sustained. By the famous statute against fraudulent conveyances (13 Eliz. c. 5, enacted in 1570) it was declared that parties to the transaction shall be subject to an action for a penalty of which one moiety shall go to the crown and the other to the party aggrieved, and in some states similar provision has been made.¹ But apart from statute, as has already

¹ As in Maine (Rev. St. 1903, c. 114, § 77, providing that "whoever knowingly aids or assists a debtor or prisoner in a fraudulent transfer or concealment of his property to secure it from creditors, and

been seen, it would appear that damages are not recoverable in a tort action merely because one may have prevented the collection of a debt not reduced to judgment,² or even though there may have been judgment obtained, unless a lien upon the property has thereby been acquired.³ It is this interference with a lien⁴ which gives rise to a cause of action.⁵ While many of the cases cited were suits for conspiracy, it is submitted that the rule is not peculiar to such actions.

Where one seized under civil process has been rescued,⁶ an action lies against the rescuer in favor of him by whom the writ was issued, "for he is the party who hath the loss,"⁷ and so where there has been a rescue of goods seized under a distress.⁸

to prevent its attachment or seizure on execution, is liable to any creditor suing therefor in an action on the case, in double the amount of property so fraudulently transferred or concealed, not exceeding double the amount of the creditor's demand," *Fogg v. Lawry*, 71 Me. 215; *Spaulding v. Fisher*, 57 Me. 411); North Carolina (Pell's Revision 1908, § 1939, giving a cause of action to creditors against one who shall remove or aid in removing a debtor out of the county with fraudulent intent, *Moffitt v. Burgess*, 53 N. C. 342; *Godsey v. Bason*, 30 N. C. 260), and Vermont (Pub. St. 1906, § 5783, giving a *qui tam* action against parties to fraudulent conveyances, contracts, judgments, etc., *Colgate v. Hill*, 20 Vt. 56).

² See *supra*, p. 9.

³ *Braem v. Merchants' Nat. Bank of Syracuse*, 127 N. Y. 509, 28 N. E. 597; *Hurwitz v. Hurwitz*, 10 Misc. Rep. 353, 31 N. Y. Supp. 25.

⁴ *Adams v. Paige*, 7 Pick. (Mass.) 542 (lien created by attachment); *Michalson v. All*, 43 S. C. 459, 21 S. E. 323, 49 Am. St. Rep. 857 (lien created by contract). Cf. *Findlay v. McAllister*, 113 U. S. 104, 5 Sup. Ct. 401, 28 L. Ed. 930.

⁵ Still there seems no reason why plaintiff might not have redress, where there has been an interference rendering unenforceable a decree in equity. See *Hoefler v. Hoefler*, 12 App. Div. 84, 42 N. Y. Supp. 1035, 4 N. Y. Ann. Cas. 1 (inducing and assisting one against whom a decree for alimony is known to have been rendered to leave the state).

⁶ *Hodges v. Marks*, Cro. Jac. 485. Cases are collected in *Findlay v. McAllister*, 113 U. S. 104, 5 Sup. Ct. 401, 28 L. Ed. 930.

⁷ *Mynn v. Coughton*, Cro. Car. 109. There seems no reason why

⁸ Blackstone's Comm. book III, p. 146. See *Hamlin v. Mack*, 33 Mich. 103.

One against whom judgment is rendered can have no action against a witness who gave false testimony. To permit this would virtually put it "in the power of every suitor to re-examine every suit in which he is cast, and to try the witnesses for perjury by instituting against them a civil suit. This course of things would be as interminable as it is in its nature intolerable."⁹ Nor may he sue a suborner.¹⁰ It has been held, however, that one defamed by the testimony may have recovery against the suborner, where neither was a party to the prior action,¹¹ and, as has already been seen,¹² the witness may subject himself to liability by giving slanderous and irrelevant testimony.

In conclusion, it should be noted that, although the particular act of interference may not give rise to an action in tort, it may constitute a criminal or civil contempt of court.¹³

PERVERSION OF LEGAL REMEDIES—MALICIOUS PROSECUTION

100. The tort of malicious prosecution arises where judicial proceedings of a certain character, usually criminal, have been instituted or continued with malice and without probable cause, and have terminated favorably to the defendant therein.

a similar action would not lie where property so seized has been rescued.

⁹ *Cunningham v. Brown*, 18 Vt. 123, 126, 46 Am. Dec. 140. To the same effect, *Stevens v. Rowe*, 59 N. H. 578, 47 Am. Rep. 231; *Young v. Leach*, 27 App. Div. 293, 50 N. Y. Supp. 670; *Godette v. Gaskill*, 151 N. C. 52, 65 S. E. 612, 24 L. R. A. (N. S.) 265, 134 Am. St. Rep. 964; *Damport v. Simpson*, Cro. Eliz. 520, 78 Eng. Repr. 769.

¹⁰ *Bostwick v. Lewis*, 2 Day (Conn.) 447; *Stevens v. Rowe*, *supra*; *Young v. Leach*, *supra*. Contra, by statute, both as to perjurer and suborner. *Landers v. Smith*, 78 Me. 212, 3 Atl. 463.

¹¹ *Rice v. Coolidge*, 121 Mass. 393, 23 Am. Rep. 279.

¹² See *supra*, pp. 326, 327.

¹³ See Consol. Laws N. Y. c. 30, §§ 750, 753; *King v. Barnes*, 113 N. Y. 476, 21 N. E. 182; *Lowenthal v. Hodge*, 120 App. Div. 304, 105 N. Y. Supp. 120.

This tort is somewhat peculiar, for the injury which ensues causes it to partake of the nature of other wrongs from which it is entirely distinct. Thus the assertion of another's wrongdoing necessarily involved in a criminal prosecution, or in some kinds of civil actions, may constitute an attack on reputation.¹⁴ If there has been detainer under a warrant or process it is an injury to the person, while if lands or goods are seized there will have been an invasion of property rights.¹⁵ It therefore becomes necessary to emphasize the elements of malicious prosecution. All are essential, since, if but a single one be lacking, no cause of action has been established.¹⁶ There must have been—

(a) A judicial proceeding, (b) instituted or continued without probable cause therefor, and (c) with malice, (d) terminating favorably to the defendant therein.

There is a sharply drawn distinction between false imprisonment and malicious prosecution. In the former the detention is unlawful.¹⁷ In the latter, if there has been an arrest, it is assumed to be lawful.¹⁸ Malice is not required to be established in actions for false imprisonment. It is essential in actions for malicious prosecution.¹⁹ The same is true of the want of probable cause.²⁰ Hence one who has been detained may sometimes have a choice of remedies, as where the court lacked jurisdiction. He may make the ille-

¹⁴ Cf. *Lawrence v. Hagerman*, 56 Ill. 68, 8 Am. Rep. 674; 3 Blackstone, Comm. 126.

¹⁵ Cf. *LUBY v. BENNETT*, 111 Wis. 613, 87 N. W. 804, 56 L. R. A. 261, 87 Am. St. Rep. 897, Chapin Cas. Torts, 279.

¹⁶ *Miller v. Milligan*, 48 Barb. (N. Y.) 30.

¹⁷ *Nebenzahl v. Townsend*, 61 How. Prac. (N. Y.) 353.

¹⁸ *Page v. Citizens' Banking Co.*, 111 Ga. 73, 36 S. E. 418, 51 L. R. A. 463, 78 Am. St. Rep. 144; *Haskins v. Ralston*, 69 Mich. 63, 37 N. W. 45, 13 Am. St. Rep. 376; *Murphy v. Martin*, 58 Wis. 276, 16 N. W. 603.

¹⁹ *Boaz v. Tate*, 43 Ind. 60; *Colter v. Lower*, 35 Ind. 285, 9 Am. Rep. 735; *Hobbs v. Ray*, 18 R. I. 84, 25 Atl. 694.

²⁰ See *Nebenzahl v. Townsend*, 61 How. Prac. (N. Y.) 353. Still, as has been seen, this may become important in actions for false imprisonment based on certain arrests without warrant, though it is then part of defendant's case, and not of plaintiff's. See *supra*, p. 284.

gality of the detention the gravamen of his action, or may waive its illegality and assert that the process was issued maliciously and without probable cause.²¹

(a) *A Judicial Proceeding*

Ordinarily this is a criminal prosecution, for as to civil actions the courts are not in accord. At common law an action on the case was given for all civil suits brought maliciously and without probable cause. But after the statute of Marlbridge (52 Hen. III), which gave costs by way of damage against plaintiff *pro falso clamore* such right of action was denied unless there had been an arrest of the person, or a seizure of property, or other special injury, which would not necessarily result in all suits prosecuted for like causes.²² In this country the tendency appears to be toward the common-law doctrine, though a number of states adhere to the rule evolved after the statute of Marlbridge. It can be said in favor of the latter view that actions for malicious prosecution are not favorites of the law and are jealously regarded. Their tendency is to discourage prosecution for crimes, for the love of justice may not always be strong enough to induce individuals to commence prosecutions when, if they fail, they may be mulcted in damages.²³ Stronger reasons may be urged where a civil action has been brought. It has been said that "the courts are open and free to all who have grievances and seek remedies therefor, and there should be no restraint upon a suitor through fear of liability resulting from failure in his action which would keep him from the courts. * * * If an action may be maintained against a plaintiff for the ma-

²¹ Gibbs v. Ames, 119 Mass. 60; Apgar v. Woolston, 43 N. J. Law, 57; Morris v. Scott, 21 Wend. (N. Y.) 281, 34 Am. Dec. 236; Castro v. De Uriarte (D. C.) 12 Fed. 250.

²² Supreme Lodge American Protective League of Baltimore City v. Unverzagt, 76 Md. 104, 106, 24 Atl. 323, citing authorities.

²³ Stone v. Crocker, 41 Mass. (24 Pick.) 81, where, however, it was added (page 83): "What greater private injury can any man suffer than to be arraigned for a felony or other crime, exposed to the danger of a conviction, and subjected to the expense, vexation, and ignominy of a public trial; and what act can more deserve the severest animadversion of the law, than the prostitution of its process at the expense of innocence."

licious prosecution of a suit without probable cause, why should not a right of action accrue against a defendant who defends without probable cause and with malice?"²⁴ But to this other courts have answered that where the plaintiff has brought his action maliciously and without probable cause, thereby subjecting the defendant to damages beyond the statutory costs, he has no legal or equitable right to claim protection under a rule designed only for the benefit of the honest suitor, and to the argument that, if a plaintiff should subject himself to liability under such circumstances, so must one who has made a groundless defense, the objection is made that it ignores the difference between the position of the parties, for it is the plaintiff who has set the law in motion, while the defendant has merely exercised his privilege of calling upon his opponent to prove his case.²⁵ But there are certain exceptional cases of a civil nature which the authorities agree may serve as the basis of an action for malicious prosecution; e. g., where there has been an interference with person²⁶ or property,²⁷ or where the nature of the proceeding

²⁴ *Wetmore v. Mellinger*, 64 Iowa, 741, 744, 18 N. W. 870, 52 Am. Rep. 465. To the same effect, *Smith v. Michigan Buggy Co.*, 175 Ill. 619, 51 N. E. 569, 67 Am. St. Rep. 242; *Supreme Lodge American Protective League of Baltimore City v. Unverzagt*, 76 Md. 104, 24 Atl. 323; *Paul v. Fargo*, 84 App. Div. 9, 82 N. Y. Supp. 369; *Bitz v. Meyer*, 40 N. J. Law, 252, 29 Am. Rep. 233; *Terry v. Davis*, 114 N. C. 31, 18 S. E. 943; *Muldoon v. Rickey*, 103 Pa. 110, 49 Am. Rep. 117.

²⁵ *Eastin v. Bank of Stockton*, 66 Cal. 123, 4 Pac. 1106, 56 Am. Rep. 77; *Whipple v. Fuller*, 11 Conn. 582, 29 Am. Dec. 330; *McCardle v. McGinley*, 86 Ind. 538, 44 Am. Rep. 343; *Smith v. Burrus*, 106 Mo. 94, 16 S. W. 881, 13 L. R. A. 59, 27 Am. St. Rep. 329; *Kolka v. Jones*, 6 N. D. 461, 71 N. W. 558, 66 Am. St. Rep. 615; *Closson v. Staples*, 42 Vt. 209, 1 Am. Rep. 316.

²⁶ As by *habeas corpus*, *Brown v. McIntyre*, 43 Barb. (N. Y.) 344; order of arrest, *Lauzon v. Charroux*, 18 R. I. 467, 28 Atl. 975; or writ of *ne exeat*, *Burnap v. Albert*, 4 Fed. Cas. No. 2,170, Taney, 244.

²⁷ *Schumann v. Torbett*, 86 Ga. 25, 12 S. E. 185 (garnishment); *Nelson v. Danielson*, 82 Ill. 545 (attachment); *Brounstein v. Sahlein*, 65 Hun, 365, 20 N. Y. Supp. 213 (replevin); *Willard v. Holmes, Booth & Haydens*, 142 N. Y. 492, 37 N. E. 480 (attachment); *LUBY v. BENNETT*, 111 Wis. 613, 87 N. W. 804, 56 L. R. A. 261, 87 Am. St. Rep. 897, Chapin Cas. Torts, 279 (receivership). There is a remedy on common-law principles, aside from the remedy on the attachment bond. *Preston v. Cooper*, 19 Fed. Cas. No. 11,395, 1 Dill. 589.

is such that its very institution must necessarily strike home at credit or reputation. Within this last class are proceedings in bankruptcy,²⁸ and lunacy,²⁹ and to procure the dissolution of a company or partnership.³⁰ Here the analogy between malicious prosecution and defamation is strong.

The courts are not altogether in accord as to what constitutes the commencement of a criminal prosecution or civil action. As the tendency of a false charge is to bring into disrepute the party against whom it is made, it is submitted that a technical commencement of the prosecution should not be required. The wrong consists in setting it on foot. Hence it should be sufficient that a warrant is issued, though it is never executed,³¹ and on principle it seems that a like result should be reached where process has been issued in a civil action.³² Still the reasoning should not be carried to the extent of sustaining an action when there has been merely an accusation preferred before a magistrate and no warrant was ever issued, nor the party accused in fact arrested,³³ or where there has been an arrest without process and no complaint has been made; for, as the arrest has not been followed by a judicial proceeding, the remedy, if there be one, must be sought in an action for false imprisonment.³⁴

It has been held that an action for malicious prosecution will not lie where one has not charged another with the commission of any specific offense known to the criminal law, though on the charge as made a warrant did in fact

²⁸ *Wilkinson v. Goodfellow-Brooks Shoe Co.* (C. C.) 141 Fed. 218.

²⁹ *Lockenour v. Sides*, 57 Ind. 360, 26 Am. Rep. 58.

³⁰ *Quartz Hill C. G. M. Co. v. Eyre*, L. R. 11 Q. B. D. 674, 52 L. J. Q. B. 488, 49 L. T. Rep. N. S. 249, 31 Wkly. Rep. 668. See *LUBY v. BENNETT*, 111 Wis. 613, 87 N. W. 804, 56 L. R. A. 261, 87 Am. St. Rep. 897, Chapln Cas. Torts, 279.

³¹ *Coffey v. Myers*, 84 Ind. 105; *Holmes v. Johnson*, 44 N. C. 44; *HALBERSTADT v. NEW YORK LIFE INS. CO.*, 194 N. Y. 1, 86 N. E. 801, 21 L. R. A. (N. S.) 293, 16 Ann. Cas. 1102, Chapln Cas. Torts, 286.

³² But contra, *Maskell v. Barker*, 99 Cal. 642, 34 Pac. 340, holding the mere issuance of an attachment insufficient, where no levy made.

³³ *Heyward v. Cuthbert*, 4 McCord (S. C.) 354; *Cooper v. Armour* (C. C.) 42 Fed. 215, 8 L. R. A. 47.

³⁴ *Barry v. Third Ave. R. Co.*, 51 App. Div. 385, 64 N. Y. Supp. 615.

issue and an arrest was made.³⁵ It is admitted that such a case is not identical with one where the complainant has undertaken to charge a recognized crime, but has in fact charged no legal offense,³⁶ or where, the charge being of a recognized crime, the acts set forth in the complaint fail to show its commission;³⁷ but it is at least questionable whether the rule of liability which there prevails cannot with propriety be applied here. True, in a technical sense no crime is stated; but there has been a charge sufficiently stated to entitle the proceedings to be called a prosecution. It was deemed sufficient by the complainant and the magistrate. Can one whose reputation has been assailed, who has perhaps suffered arrest and been put to the expense of employing counsel in his defense, be dismissed from court with the assurance that he really never was prosecuted at all? Can one who has acted through malice and without probable cause be heard to say that there was no prosecution in fact, because there should have been none?³⁸ Is it, indeed, any the less a prosecution because it is defended on the law and not on the facts?³⁹ An indictment will be deemed sufficient ground for an action, though it be faulty.⁴⁰

The foregoing criticism, it is submitted, can also be made of the decisions holding there can be no malicious prosecution where the court or magistrate lacked jurisdiction,⁴¹ and

³⁵ *Krause v. Spiegel*, 94 Cal. 370, 29 Pac. 707, 15 L. R. A. 707, 28 Am. St. Rep. 137 (slander); *Collum v. Turner*, 102 Ga. 534, 27 S. E. 680 (lying and misrepresentation); *Newman v. Davis*, 58 Iowa, 447, 10 N. W. 852 (abusive language); *Kramer v. Lott*, 50 Pa. 495, 88 Am. Dec. 556 (trespass).

³⁶ *Shaul v. Brown*, 28 Iowa, 37, 4 Am. Rep. 151; *Finn v. Frink*, 84 Me. 261, 24 Atl. 851, 30 Am. St. Rep. 348; *Navarino v. Dudrap*, 66 N. J. Law, 620, 50 Atl. 353; *Lueck v. Helsler*, 87 Wis. 644, 58 N. W. 1101.

³⁷ *Dennis v. Ryan*, 65 N. Y. 385, 22 Am. Rep. 635.

³⁸ See *Parli v. Reed*, 30 Kan. 534, 2 Pac. 635; *Bell v. Keepers*, 37 Kan. 64, 14 Pac. 542; *Barton v. Kavanaugh*, 12 La. Ann. 332; *Mask v. Rawls*, 57 Miss. 270.

³⁹ Cf. *Finn v. Frink*, 84 Me. 261, 24 Atl. 851, 30 Am. St. Rep. 348.

⁴⁰ *Chambers v. Robinson*, 2 Str. 691; *Jones v. Gwynn*, 10 Mod. 148.

⁴¹ *Vinson v. Flynn*, 64 Ark. 453, 43 S. W. 146, 46 S. W. 186, 39 L. R. A. 415; *Berger v. Saul*, 113 Ga. 869, 39 S. E. 326; *Bixby v. Brun-*

that the correct view is that, if plaintiff chooses to make malice and want of probable cause the gravamen of his action, "it is all one whether there were any jurisdiction or no."⁴²

(b) Probable Cause

is "such a state of facts and circumstances as would lead a man of ordinary caution and prudence, acting conscientiously, impartially, reasonably, and without prejudice upon the facts within his knowledge, to believe that the person accused is guilty."⁴³ In a definition which has been much repeated the phrase "cautious man" is used,⁴⁴ but this appears open to the objection that, unless qualified, "cautious" suggests the idea of timidity.⁴⁵ So, where there has been a civil action, probable cause must be tested in the same manner as in the case of a criminal prosecution, to ascertain whether there was justification for instituting the proceedings.⁴⁶ Both are governed by the same principles.⁴⁷

dige, 2 Gray (Mass.) 129, 61 Am. Dec. 443; Painter v. Ives, 4 Neb. 122.

⁴² Attwood v. Monger, Style 378, 379, 82 Eng. Repr. 793. To the same effect: Stone v. Stevens, 12 Conn. 219, 30 Am. Dec. 611; Stubbs v. Mulholland, 168 Mo. 47, 67 S. W. 650; Morris v. Scott, 21 Wend. (N. Y.) 281, 34 Am. Dec. 236; Sutor v. Wood, 76 Tex. 403, 13 S. W. 321; Allstock v. Moore Lime Co., 104 Va. 565, 52 S. E. 213, 2 L. R. A. (N. S.) 1100, 113 Am. St. Rep. 1060, 7 Ann. Cas. 545.

⁴³ Heyne v. Blair, 62 N. Y. 19, 22. This has been criticized as going too far in requiring the prosecutor to act "impartially, reasonably, and without prejudice." This, it was said, "is too much to expect of human nature, and would discourage the institution of necessary criminal prosecutions, to great public disadvantage." Casey v. Sevaton, 30 Minn. 516, 518, 16 N. W. 407. But the language of the definition, rightly considered, does not import that the prosecutor must have acted wholly without prejudice in the particular case, but that an unprejudiced mind would have reached the same conclusion.

⁴⁴ McDavidd v. Blevins, 85 Ill. 238, 241; Boyd v. Cross, 35 Md. 194, 197; Cole v. Curtis, 16 Minn. 182 (Gil. 161); Carl v. Ayers, 53 N. Y. 14, 17; Munns v. De Nemours, 17 Fed. Cas. No. 9,926, 3 Wash. C. C. 31.

⁴⁵ McClafferty v. Philp, 151 Pa. 86, 24 Atl. 1042. Authorities are collected in Vinal v. Core, 18 W. Va. 1.

⁴⁶ Spengler v. Davy, 15 Grat. (Va.) 381; Porter v. Mack, 50 W. Va. 581, 40 S. E. 459.

⁴⁷ See Stewart v. Sonneborn, 98 U. S. 187, 192, 25 L. Ed. 116.

What circumstances are sufficient to constitute probable cause must be decided by the court.⁴⁸ "But to the jury it must be referred whether the circumstances which amount to probable cause are proved by credible testimony or not."⁴⁹ By this is meant that if the facts are controverted, if conflicting testimony is to be weighed, or if the credibility of witnesses is to be passed upon, the jury must determine what the facts are, and then, in accordance with the instructions of the court, render a verdict accordingly. Here the frequent practice is to instruct the jury hypothetically.⁵⁰ But, where there is no issue as to the facts, the court will direct a finding that probable cause did or did not exist.⁵¹ There is a seeming exception, however, when the question of the prosecutor's belief in the facts relied on to show probable cause is involved. What this belief was is for the jury.⁵²

The accuser will be protected if there were reasonable cause to believe in the guilt of the accused, though the latter were in fact innocent,⁵³ and this it has been thought must be determined as of the time when action was taken,

⁴⁸ See cases cited in succeeding notes; also *Atchison, T. & S. F. R. Co. v. Watson*, 37 Kan. 773, 15 Pac. 877; *Stone v. Crocker*, 24 Pick. (Mass.) 81; *Smith v. Munch*, 65 Minn. 256, 68 N. W. 19; *Panton v. Williams*, 2 Q. B. 169. Though the weight of authority is in favor of treating probable cause as a question for the court, it has been held by the New York Court of Appeals that, where the situation is such that different conclusions may reasonably be drawn, probable cause must be determined by the jury. *Galley v. Brennan*, 216 N. Y. 118, 110 N. E. 179, quoting *Heyne v. Blair*, 62 N. Y. 19. But see *Rawson v. Leggett*, 184 N. Y. 504, 77 N. E. 662; *Anderson v. How*, 116 N. Y. 336, 22 N. E. 695. Cf. *Davis v. McMillan*, 142 Mich. 391, 105 N. W. 862, 3 L. R. A. (N. S.) 928, 113 Am. St. Rep. 585, 7 Ann. Cas. 854.

⁴⁹ *Munns v. De Nemours*, 17 Fed. Cas. No. 9,926, 3 Wash. C. C. 31.

⁵⁰ *Shaul v. Brown*, 28 Iowa, 37, 4 Am. Rep. 151; *Boyd v. Cross*, 35 Md. 194; *Hess v. Oregon Baking Co.*, 31 Or. 503, 49 Pac. 803.

⁵¹ *Holliday v. Holliday*, 123 Cal. 26, 55 Pac. 703.

⁵² *Stewart v. Sonneborn*, 98 U. S. 187, 194, 25 L. Ed. 116.

⁵³ *Davie v. Wisher*, 72 Ill. 262; *KNAPP v. CHICAGO, B. & Q. R. CO.*, 113 Iowa, 532, 85 N. W. 769, *Chapin Cas. Torts*, 293; *Hall v. Suydam*, 6 Barb. (N. Y.) 83.

for if the proceeding was unjustified when instituted it cannot be made lawful because of facts subsequently learned.⁵⁴ It must be kept in mind, however, that one will not only be held accountable for what he knows, but also for what he would have learned by availing himself of such means of information as a reasonably prudent man would have used.⁵⁵ But apparently by the weight of authority actual guilt will constitute a complete defense, no matter when knowledge of the facts was acquired. "Reason and conscience," it is said, "revolt at the bare thought of a proven criminal recovering damages against the prosecutor."⁵⁶ Logically this is quite apart from any question of probable cause, and is based upon the theory that "the action for malicious prosecution was designed for the benefit of the innocent and not of the guilty."⁵⁷

By the prevailing view a discharge by the examining magistrate for lack of proof may be evidence of a want of probable cause,⁵⁸ and like effect has been given to the refusal by a grand jury to find an indictment,⁵⁹ though both doctrines, and particularly the last, seem open to objection. At all events, no inference should be drawn from an ac-

⁵⁴ *Smith v. King*, 62 Conn. 515, 26 Atl. 1059; *Nachtman v. Hammer*, 155 Pa. 200, 26 Atl. 311; *Delegal v. Highley*, 3 Bing. N. C. 950.

⁵⁵ *Boyd v. Mendenhall*, 53 Minn. 274, 55 N. W. 45; *Stubbs v. Mulholland*, 168 Mo. 47, 67 S. W. 650.

⁵⁶ *Threefoot v. Nuckols*, 68 Miss. 116, 123, 8 South. 335, per Woods, C. J. To the same effect, *Parkhurst v. Masteller*, 57 Iowa, 474, 10 N. W. 864; *Turner v. Dinnegar*, 20 Hun (N. Y.) 465; *Mack v. Sharp*, 138 Mich. 448, 101 N. W. 631, 5 Ann. Cas. 109; *Thurber v. Eastern Building & Loan Ass'n*, 118 N. C. 129, 24 S. E. 730. See *Bacon v. Towne*, 4 Cush. (Mass.) 217, holding that proof of actual guilt was at least competent in mitigation of damages.

⁵⁷ *Newton v. Weaver*, 13 R. I. 616, 617, per Matteson, J.

⁵⁸ *Hidy v. Murray*, 101 Iowa, 65, 69 N. W. 1138; *Frost v. Holland*, 75 Me. 108; *Stubbs v. Mulholland*, 168 Mo. 47, 67 S. W. 650; *Barhight v. Tammany*, 158 Pa. 545, 28 Atl. 135, 38 Am. St. Rep. 853; *Eggett v. Allen*, 119 Wis. 625, 96 N. W. 803. Contra, *Davis v. McMillan*, 142 Mich. 391, 105 N. W. 862, 3 L. R. A. (N. S.) 928, 113 Am. St. Rep. 585, 7 Ann. Cas. 854.

⁵⁹ *Ambs v. Atchison, T. & S. F. R. Co. (C. C.)* 114 Fed. 317. And see *Harper v. Harper*, 49 W. Va. 661, 39 S. E. 661. Contra, *Apgar v. Woolston*, 43 N. J. Law, 57; *Caldwell v. Bennett*, 22 S. C. 1 (semble).

quittal after trial.⁶⁰ On the other hand, a commitment or holding for trial by the examining magistrate⁶¹ will be deemed *prima facie* to establish probable cause, unless shown to have been procured by false or fraudulent testimony or other improper means.⁶² But, subject possibly to the same exceptions,⁶³ a conviction after trial,⁶⁴ though subsequently reversed on appeal,⁶⁵ is regarded as conclusive. The reason is obvious. If it were not so, litigation would be endless.

Probable cause will be deemed established upon proof that there has been a settlement or compromise of the original proceeding, voluntarily entered into and not brought about by fraud, duress, or other unlawful means.⁶⁶

A careful man, before instituting a prosecution, will naturally seek the advice of one learned in the law, rather

⁶⁰ *Skidmore v. Bricker*, 77 Ill. 164; *Bitting v. Ten Eyck*, 82 Ind. 421, 42 Am. Rep. 505; *Philpot v. Lucas*, 101 Iowa, 478, 70 N. W. 625; *Bell v. Percy*, 33 N. C. 233.

⁶¹ *Ewing v. Sanford*, 19 Ala. 605; *Diemer v. Herber*, 75 Cal. 287, 17 Pac. 205; *Bacon v. Towne*, 4 Cush. (Mass.) 217; *Bechel v. Pacific Express Co.*, 65 Neb. 826, 91 N. W. 853; *Schultz v. Greenwood Cemetery*, 190 N. Y. 276, 83 N. E. 41.

⁶² *Peck v. Chouteau*, 91 Mo. 138, 3 S. W. 577, 60 Am. Rep. 236; *Firer v. Lowery*, 59 Mo. App. 92; *Giusti v. Del Papa*, 19 R. I. 338, 33 Atl. 525. But see *Perkins v. Spaulding*, 182 Mass. 218, 65 N. E. 72, holding that it is evidence, though not *prima facie*.

⁶³ That the conviction may be shown to have been procured by perjury or other improper means, see *Holliday v. Holliday*, 123 Cal. 26, 55 Pac. 703 (semble); *Murphy v. Ernst*, 46 Neb. 1, 64 N. W. 353 (semble); *Johnson v. Girdwood*, 7 Misc. Rep. 651, 28 N. Y. Supp. 151, affirmed 143 N. Y. 660, 39 N. E. 21 (plea of guilty induced by fraud and duress); *Lawrence v. Cleary*, 88 Wis. 473, 60 N. W. 793 (semble). Contra, *Severance v. Judkins*, 73 Me. 376; *Williams v. Woodhouse*, 14 N. C. 257.

⁶⁴ *Severance v. Judkins*, 73 Me. 376; *Cloon v. Gerry*, 13 Gray (Mass.) 201; *Blackman v. West Jersey & S. S. R. Co.* (C. C.) 126 Fed. 252; *Basébé v. Matthews*, L. R. 2 C. P. 684, 16 L. T. N. S. 417, 36 L. J. M. C. 93, 15 Wkly. Rep. 839.

⁶⁵ *Holliday v. Holliday*, 123 Cal. 26, 55 Pac. 703 (discharge on habeas corpus); *Hartshorn v. Smith*, 104 Ga. 235, 30 S. E. 666; *Dennehey v. Woodsum*, 100 Mass. 195; *Womack v. Circle*, 32 Grat. (Va.) 324.

⁶⁶ *Morton v. Young*, 55 Me. 24, 92 Am. Dec. 565; *Sartwell v. Parker*, 141 Mass. 405, 5 N. E. 807. And see *infra*, p. 490.

than act wholly on his own responsibility. If he does so in good faith, and fully and fairly states the facts which he knows and has reasonable grounds to believe exist, as well as those which by proper diligence he could have ascertained, his honest reliance upon the advice he had received should protect him. His subsequent action is not without probable cause, though some courts have thought that advice of counsel goes rather to negative malice. Logically it should constitute a complete defense, both where there has been a criminal action,⁶⁷ and a civil proceeding.⁶⁸ Necessarily this will include a case where he has consulted the district attorney or prosecuting officer.⁶⁹ But the party consulted must have been licensed to practice law, for the advice of a layman,⁷⁰ even though he be a magistrate, will not be considered as a justification,⁷¹ and the attorney must not be known to be an interested party, since an unbiased opinion should be sought.⁷² Likewise there must have been no misrepresentation or withholding

⁶⁷ *McLeod v. McLeod*, 73 Ala. 42; *Donnelly v. Daggett*, 145 Mass. 814, 14 N. E. 161; *Wakely v. Johnson*, 115 Mich. 285, 73 N. W. 238; *Eastman v. Keasor*, 44 N. H. 518; *Topolewski v. Plankinton Packing Co.*, 143 Wis. 52, 126 N. W. 554. In New York it has been held that, while advice of counsel may be considered in determining malice, it "does not form the basis for a finding of fact" as to probable cause. The reason assigned is that "probable cause may be founded on misinformation as to the facts, but not as to the law." *Hazzard v. Flury*, 120 N. Y. 223, 227, 24 N. E. 194. This seems a strange application of the maxim, "Ignorance of the law excuses no one." See, also, *Brown v. McBride*, 24 Misc. Rep. 235, 52 N. Y. Supp. 620. To the same effect, *Downing v. Stone*, 152 N. C. 525, 68 S. E. 9, 136 Am. St. Rep. 841, 21 Ann. Cas. 753.

⁶⁸ *Sandell v. Sherman*, 107 Cal. 391, 40 Pac. 493; *Stone v. Swift*, 4 Pick. (Mass.) 389, 16 Am. Dec. 349; *Alexander v. Harrison*, 38 Mo. 258, 90 Am. Dec. 431; *Kompass v. Light*, 122 Mich. 86, 80 N. W. 1008; *Newton v. Weaver*, 13 R. I. 616.

⁶⁹ *Fowles v. Hayden*, 129 Mich. 586, 89 N. W. 339; *Magowan v. Rickey*, 64 N. J. Law, 402, 45 Atl. 804.

⁷⁰ *Stanton v. Hart*, 27 Mich. 539.

⁷¹ *Stephens v. Gravit*, 136 Ky. 479, 124 S. W. 414; *Olmstead v. Partridge*, 16 Gray (Mass.) 381; *Sutton v. McConnell*, 46 Wis. 269, 50 N. W. 414.

⁷² *White v. Carr*, 71 Me. 555, 36 Am. Rep. 533.

of material facts,⁷³ and it must appear that the client has acted under the advice in good faith.⁷⁴ It is not necessary, however, that the facts should have justified counsel's opinion. "If this were so, then the professional advice would be entirely useless for any purpose, because the defense would be complete without it."⁷⁵

It only remains to add that the accuser must have had an honest belief that the facts alleged to constitute probable cause were true and that the accused was guilty. He cannot be permitted to make these facts "the pretext for prosecution, without even entertaining the opinion that he had a right to prosecute."⁷⁶

(c) Malice

The terms "malice in law" and "malice in fact" have already been discussed.⁷⁷ It is the latter which must be established in actions for malicious prosecution as a part of plaintiff's case. It will, of course, exist where there is personal hatred; but it is likewise shown where there are "indirect or improper motives, though these may be wholly unconnected with any uncharitable feeling towards anybody."⁷⁸ Thus, where there has been a criminal prosecu-

⁷³ *Cointement v. Cropper*, 41 La. Ann. 303, 6 South. 127; *Cooper v. Utterbach*, 37 Md. 282; *Norrell v. Vogel*, 39 Minn. 107, 38 N. W. 705; *Hippler v. Quandt*, 145 Wis. 221, 129 N. W. 1099; *Cuthbert v. Galloway (C. C.)* 35 Fed. 466. Where an attachment has been procured, the client must make full disclosure as to the grounds thereof. *Scovill v. Glasner*, 79 Mo. 449.

⁷⁴ *McCarthy v. Kitchen*, 59 Ind. 500; *Cole v. Curtis*, 16 Minn. 182 (Gil. 161); *Ravenga v. Mackintosh*, 2 B. & C. 693.

⁷⁵ *Steed v. Knowles*, 79 Ala. 446, 451. To the same effect, *Kompass v. Light*, 122 Mich. 86, 80 N. W. 1008; *Walter v. Sample*, 25 Pa. 275.

⁷⁶ *Harkrader v. Moore*, 44 Cal. 144, 147; *Watson v. Cain*, 171 Ala. 151, 54 South. 610; *Michael v. Matson*, 81 Kan. 360, 105 Pac. 537, L. R. A. 1915D, 1; *Spear v. Hiles*, 67 Wis. 350, 30 N. W. 506. "It would be quite outrageous if, where a party is proved to believe that a charge is unfounded, it were to be held that he could have reasonable and probable cause." *Haddrick v. Heslop*, 12 Adol. & El. N. S. 267, 274, per Lord Denman, C. J.

⁷⁷ See *supra*, p. 338 et seq.

⁷⁸ *Hicks v. Faulkner*, L. R. 8 Q. B. D. 167, 175, 46 J. P. 420, 51 L. J. Q. B. 268, 47 L. T. Rep. N. S. 127, 30 Wkly. Rep. 545.

tion, it may roughly be defined as some motive other than that of bringing a guilty party to justice,⁷⁹ e. g., to recover property,⁸⁰ or to collect a debt,⁸¹ or to "tie up the mouths" of certain witnesses in another action,⁸² or as an experiment and for the purpose of finding out who had committed a particular crime.⁸³ This does not, however, mean that all selfish motive must be absolutely absent. If only incidental, it will not make the motive malicious, "for it can hardly be expected that all selfish aims and desires can be eliminated from such prosecutions."⁸⁴ It is not, of course, essential that malice be established by direct testimony. It may be shown by circumstantial evidence,⁸⁵ as wherever there has been a wanton, a gross, a reckless disregard of the rights of another.⁸⁶ So the jury are at liberty to infer

⁷⁹ *Krug v. Ward*, 77 Ill. 603, 608; *Gabel v. Weisensee*, 49 Tex. 131, 138; *Vinal v. Core*, 18 W. Va. 1, 27.

⁸⁰ *Kimball v. Bates*, 50 Me. 308; *Kendrick v. Cypert*, 10 Humph. (Tenn.) 291; *Gabel v. Weisensee*, 49 Tex. 131.

⁸¹ *Toomey v. Delaware, L. & W. R. Co.*, 4 Misc. Rep. 392, 24 N. Y. Supp. 108, 53 N. Y. St. Rep. 567, affirmed 147 N. Y. 709, 42 N. E. 726; *Melia v. Neate*, 3 F. & F. 757. But see *Wenger v. Phillips*, 195 Pa. 214, 45 Atl. 927, 78 Am. St. Rep. 810, holding that: "Proof that a criminal process had been made use of as means for the collection of a debt is not conclusive in establishing the want of probable cause and the existence of malice. It is prima facie only, and, while sufficient to shift the burden of proof (sic) to the defendant, it may be rebutted by other proofs."

⁸² *Haddrick v. Heslop*, 12 Adol. & El. N. S. 267.

⁸³ *Johnson v. Ebberts (C. C.)* 11 Fed. 129, 6 Sawy. 538.

⁸⁴ *Thompson v. Beacon Valley Rubber Co.*, 56 Conn. 493, 497, 16 Atl. 554, per Carpenter, J.

⁸⁵ *Severns v. Brainard*, 61 Minn. 265, 63 N. W. 477, holding that, where a civil action had been brought without probable cause and had been discontinued by the plaintiff without apparent reason, evidence of the subsequent commencement by him of another suit against the same defendant upon the same cause of action is admissible to show malice. And see *Holden v. Merritt*, 92 Iowa, 707, 61 N. W. 390; *Pierce v. Thompson*, 6 Pick (Mass.) 193; *Thurston v. Wright*, 77 Mich. 96, 43 N. W. 860; *Laird v. Taylor*, 66 Barb. (N. Y.) 139; *Scott v. Shelor*, 28 Grat. (Va.) 891.

⁸⁶ *Blunk v. Atchison, T. & S. F. R. Co. (C. C.)* 38 Fed. 311, 313. To the same effect, *Stubbs v. Mulholland*, 168 Mo. 47, 67 S. W. 650; *Wiggin v. Coffin*, 29 Fed. Cas. No. 17,624, 3 Story, 1.

malice from the want of probable cause, though the converse is not true, for the want of probable cause cannot be inferred from the existence of malice.⁸⁷

Malice, unlike probable cause, is to be determined by the jury.⁸⁸ Still the court may take matters into its own hands, where the facts are not in dispute and the inferences to be drawn from them are not doubtful.⁸⁹

(d) Favorable Termination of the Proceeding

"It cannot be known until it has terminated that the action was unjust. No man can say of an action still depending that it is false or malicious."⁹⁰ If the proceeding has been properly terminated, but judgment has been rendered against the defendant therein, it has been seen⁹¹ that probable cause will be deemed established.⁹² Were this not so, "almost every case would have to be tried over again upon its merits."⁹³

What constitutes a termination? It has been said⁹⁴ that a proceeding may be considered as ended "(1) where there is a verdict of 'not guilty';⁹⁵ (2) where the grand jury ignore a bill;⁹⁶ (3) where a *nolle prosequi* is entered;⁹⁷ and (4)

⁸⁷ Grant v. Moore, 29 Cal. 644; Stone v. Stevens, 12 Conn. 219, 30 Am. Dec. 611; Parker v. Parker, 102 Iowa, 500, 71 N. W. 421; PULLEN v. GLIDDEN, 66 Me. 202, Chapin Cas. Torts, 295; Davis v. McMillan, 142 Mich. 391, 105 N. W. 862, 3 L. R. A. (N. S.) 928, 113 Am. St. Rep. 585, 7 Ann. Cas. 854; McCarthy v. Weir, 113 App. Div. 435, 99 N. Y. Supp. 372; Scott v. Shelor, 28 Grat. (Va.) 891.

⁸⁸ Lacey v. Porter, 103 Cal. 597, 37 Pac. 635; PULLEN v. GLIDDEN, 66 Me. 202, Chapin Cas. Torts, 295; Fetzner v. Burlew, 114 App. Div. 650, 99 N. Y. Supp. 1100; Schofield v. Ferrers, 47 Pa. 194, 86 Am. Dec. 532; Stewart v. Sonneborn, 98 U. S. 187, 25 L. Ed. 116.

⁸⁹ Richards v. Jewett Bros. & Co., 118 Iowa, 629, 92 N. W. 689; Bartlett v. Hawley, 38 Minn. 308, 37 N. W. 580. Cf. Brown v. Hawkes (1891) L. R. 2 Q. B. 718, 65 L. T. N. S. 108, 55 J. P. 823.

⁹⁰ Parker v. Langley, 10 Mod. 210, citing Y. B. 2 Ric. III, pl. 9.

⁹¹ See supra, p. 485.

⁹² Frisbie v. Morris, 75 Conn. 637, 55 Atl. 9.

⁹³ Basébé v. Matthews, L. R. 2 C. P. 684, 687, 36 L. J. M. C. 93, per Byles, J.

⁹⁴ Lowe v. Wartman, 47 N. J. Law, 413, 414, 1 Atl. 489.

⁹⁵ Secor v. Babcock, 2 Johns. (N. Y.) 203.

⁹⁶ Graves v. Dawson, 130 Mass. 78, 39 Am. Rep. 429n; Potter v. Casterline, 41 N. J. Law, 22.

⁹⁷ Stanton v. Hart, 27 Mich. 539; Woodman v. Prescott, 66 N. H.

where the accused has been discharged from bail or imprisonment.”⁹⁸ In this last class is a discharge by the magistrate at the preliminary hearing,⁹⁹ including cases where the prosecutor has withdrawn the charge or failed to appear,¹⁰⁰ but not where the discharge was the result of a voluntary compromise.¹⁰¹ It is enough that “the particular prosecution be disposed of in such a manner that this cannot be revived, and the prosecutor, if he proceeds further, will be put to a new one.”¹⁰² Whether a discharge on habeas corpus will of itself be sufficient is doubtful.¹⁰³

It is none the less a favorable termination because there is a right of appeal,¹⁰⁴ or even though an appeal be pend-

375, 22 Atl. 456; *Moulton v. Beecher*, 8 Hun (N. Y.) 100, 1 Abb. N. C. 193; *Douglas v. Allen*, 56 Ohio St. 156, 46 N. E. 707; *Woodworth v. Mills*, 61 Wis. 44, 20 N. W. 728, 50 Am. Rep. 135. But not where it is entered by the procurement of the party prosecuted, or by his consent, or by way of compromise. *Langford v. Boston & A. R. Co.*, 144 Mass. 431, 11 N. E. 697; *Marcus v. Bernstein*, 117 N. C. 31, 23 S. E. 38 (semble). That a *nolle prosequi* is not sufficient, see *Garing v. Fraser*, 76 Me. 37.

⁹⁸ *Rice v. Ponder*, 29 N. C. 390 (plaintiff, bound to appear at a term of court, did appear and was not rebound).

⁹⁹ *Moyle v. Drake*, 141 Mass. 238, 6 N. E. 520; *Dreyfus v. Aul*, 29 Neb. 191, 45 N. W. 282. That the magistrate was prompted by pity in discharging the accused is immaterial. *Robbins v. Robbins*, 133 N. Y. 597, 30 N. E. 977.

¹⁰⁰ *Southern Car & Foundry Co. v. Adams*, 131 Ala. 147, 32 South. 503; *Brown v. Randall*, 36 Conn. 56, 4 Am. Rep. 35; *Page v. Citizens' Banking Co.*, 111 Ga. 73, 36 S. E. 418, 51 L. R. A. 463, 78 Am. St. Rep. 144; *Cardinal v. Smith*, 109 Mass. 158, 12 Am. Rep. 682; *Fay v. O'Neill*, 36 N. Y. 11; *Waldron v. Sperry*, 53 W. Va. 116, 44 S. E. 283.

¹⁰¹ See *supra*, p. 485; *McCormick v. Sisson*, 7 Cow. (N. Y.) 715.

¹⁰² *Cooley on Torts*, vol. 1 (3d Ed.) 341, quoted in *Casebeer v. Drabole*, 13 Neb. 465, 14 N. W. 397; *Graves v. Scott*, 104 Va. 372, 379, 51 S. E. 821, 2 L. R. A. (N. S.) 927, 113 Am. St. Rep. 1043, 7 Ann. Cas. 480. To the same effect, *Southern Car & Foundry Co. v. Adams*, 131 Ala. 147, 32 South. 503; *Clark v. Cleveland*, 6 Hill (N. Y.) 344.

¹⁰³ Considered sufficient in *Holliday v. Holliday*, 123 Cal. 26, 53

¹⁰⁴ *LUBY v. BENNETT*, 111 Wis. 613, 87 N. W. 804, 56 L. R. A. 261, 87 Am. St. Rep. 897, *Chapin Cas. Torts*, 279. Or though there is a right still existing to apply by petition for a new trial. *Foster v. Denison*, 19 R. I. 351, 36 Atl. 93.

ing. In the latter event, however, it seems that the trial of the action for malicious prosecution may be stayed until the appeal is decided.¹⁰⁵

In civil proceedings, where an arrest or attachment has been issued, it is evident that, since the gravamen is the issuance of the process, a cause of action may arise when the writ is vacated or set aside because it was improperly granted, even though the suit be still pending,¹⁰⁶ or though the debt had been settled.¹⁰⁷

Damage

It has been said that plaintiff must also prove resulting damage.¹⁰⁸ This, it is submitted, is true for historical reasons. By the ancient form of pleading, actions for malicious prosecution against two or more defendants were laid with a charge of conspiracy—a practice supposed to

Pac. 703; *Zebbley v. Storey*, 117 Pa. 478, 12 Atl. 569. Contra, *Hinds v. Parker*, 11 App. Div. 327, 42 N. Y. Supp. 955, where it was said: "The discharge did not, as a matter of law, terminate the proceedings against him; he had been committed to await the action of the grand jury, and that body could proceed with an investigation of the charge made against him, notwithstanding his discharge from imprisonment by the county judge. That had no legal effect whatever upon the criminal proceedings, except to relieve him from imprisonment until the grand jury should pass upon his case." To the same effect, *Walker v. Martin*, 43 Ill. 508.

¹⁰⁵ *Marks v. Townsend*, 97 N. Y. 590.

¹⁰⁶ *Ingram v. Root*, 51 Hun, 238, 3 N. Y. Supp. 858. See *Cadwell v. Corey*, 91 Mich. 335, 51 N. W. 888.

¹⁰⁷ *Brand v. Hinchman*, 68 Mich. 590, 36 N. W. 664, 13 Am. St. Rep. 363. See *Alsop v. Lidden*, 130 Ala. 548, 30 South. 401. Contra, where the attachment debtor has procured the discharge of the writ by giving bond. *Rachelman v. Skinner*, 46 Minn. 196, 48 N. W. 776. But in New York the giving of an undertaking to discharge does not preclude the defendant from moving to vacate the attachment. *Lawlor v. Magnolia Metal Co.*, 2 App. Div. 552, 38 N. Y. Supp. 36, 74 N. Y. St. Rep. 465, 3 N. Y. Ann. Cas. 100.

It has been held that the rule requiring proof of a favorable termination of the former suit does not apply to proceedings on attachment, where the party defendant was absent and had no opportunity to defend. *Bump v. Betts*, 19 Wend. (N. Y.) 421.

¹⁰⁸ See *Webb v. Gray*, 181 Ala. 408, 62 South. 194, 197; *Byrne v. Moore*, 1 Marsh. 12, 5 Taunt. 187, 1 E. O. L. 103; *Burdick on Torts* (3d Ed.) p. 285.

owe its origin to the phraseology of the statute of 21 Edw. I, which in giving the form of writs in such cases used the words "*de placito conspirationis et transgressionis*."¹⁰⁹ But conspiracy was maintainable only where two or more were involved and the form of action as against a single wrongdoer was "on the case in the nature of a conspiracy."¹¹⁰ Now the charge of conspiracy seems never to have been deemed essential to the action, and eventually the allegation was dropped.¹¹¹ Hence the modern action for malicious prosecution took the place of the old writ of conspiracy, and like it was brought in case and not in trespass,¹¹² thus requiring proof of damage. This, it is submitted, is still the rule; whatever difficulty exists having been caused by failing to distinguish between damage as an element and its method of proof.

In *Savill v. Roberts*,¹¹³ Holt, C. J., observed "that there are three sorts of damages, any one of which is sufficient to support this action: First, damage to his fame, if the matter whereof he be accused be scandalous; secondly, to his person, whereby he is imprisoned; thirdly, to his property, whereby he is put to charges and expenses." This indicates that, while damage is an essential element, its existence may be established by other than direct proof. Nor should a special allegation be required in all cases that specific damage was caused, since, "where damages are necessarily inferable from the facts alleged, a statement of such facts sufficiently states the damages."¹¹⁴ It is therefore unnecessary to allege or prove specific damage in cases where the proceedings have been such that they may reasonably be inferred, as where the charge necessarily affects the reputation of the party accused,¹¹⁵ or there has been an

¹⁰⁹ *Skinner v. Gunton*, 1 Saund. 228, c. 230, note.

¹¹⁰ *Coxe v. Wirrall*, Cro. Jac. 194; *Mills v. Mills*, Cro. Car. 239; *Price v. Crofts*, T. Raym. 180.

¹¹¹ See *Parker v. Huntington*, 68 Mass. (2 Gray) 124.

¹¹² See Pollock on Torts (7th Ed.) 313.

¹¹³ 12 Mod. 208, 1 Ld. Raym. 374.

¹¹⁴ *LUBY v. BENNETT*, 111 Wis. 613, 627, 87 N. W. 804, 56 L. R. A. 261, 87 Am. St. Rep. 897, Chapin Cas. Torts, 279.

¹¹⁵ *Quartz Hill Consul. Gold Min. Co. v. Eyre*, 11 Q. B. D. 674, 52 L. J. Q. B. 488, 49 L. T. Rep. N. S. 249, 31 Wkly. Rep. 668. Cf. *HAL-*

interference with his person ¹¹⁶ or property.¹¹⁷ But in other cases both allegation and proof would seem necessary.¹¹⁸

MALICIOUS USE AND ABUSE OF PROCESS

101. (1) If the execution of process has been attended with unnecessary harshness or a wanton disregard of the rights of the party against whom it has been issued, or (2) if process has been maliciously used to effect an object not within its proper scope, an action will lie.

The first may be termed a malicious use, the second a malicious abuse, of process. Though it is submitted that there is a distinction between them,¹¹⁹ both are usually grouped under the single head "malicious abuse of process."¹²⁰ An example of the first is found in *Smith v. Weeks*,¹²¹ where a locomotive engineer was arrested on an attachment for contempt while preparing his engine to take out a train, at so late an hour of the night that it was impossible to procure bail, though the arrest might have been made at any time during the day, was confined in jail, and subjected to gross indignity. So in *Bradshaw v. Frazier*,¹²² a writ of removal was executed on a cold day and while the party removed was ill of the measles, thereby causing his death.¹²³

BERSTADT v. N. Y. LIFE INS. CO., 194 N. Y. 1, 86 N. E. 801, 21 L. R. A. (N. S.) 293, 16 Ann. Cas. 1102, Chapin Cas. Torts, 279.

¹¹⁶ *Garrison v. Pearce*, 3 E. D. Smith (N. Y.) 255.

¹¹⁷ See *LUBY v. BENNETT*, *supra*.

¹¹⁸ See *Allgor v. Stillwell*, 6 N. J. Law, 166.

¹¹⁹ See editorial, 30 N. Y. Law Journal, p. 528, Nov. 13, 1903.

¹²⁰ See *Cooley on Torts* (3d Ed.) p. 354; *Burdick on Torts* (3d Ed.) p. 298.

¹²¹ 60 Wis. 94, 18 N. W. 778.

¹²² 113 Iowa, 579, 85 N. W. 752, 55 L. R. A. 258, 86 Am. St. Rep. 394.

¹²³ See, further, *Zinn v. Rice*, 154 Mass. 1, 27 N. E. 772, 12 L. R. A. 288 (where in an action on contract brought by the defendant to recover \$4,522.45 damages were maliciously laid at \$40,000, and at-

An illustration of the second class, the true abuse of process is found where property was attached for the ostensible purpose of collecting a claim, but really to prevent a conveyance to an intending purchaser.¹²⁴ "Perhaps the most frequent form of such abuse is by working upon the fears of the person under arrest for the purpose of extorting money or other property, or of compelling him to sign some paper, to give up some claim, or to do some other act, in accordance with the wishes of those who have control of the prosecution."¹²⁵ Thus in a leading case¹²⁶ the captain of a vessel was arrested on civil process at a time when he could not procure bail, in order that he might be forced to surrender the ship's register. So criminal process may be resorted to, not for the purpose of vindicating the law, but to accomplish some ulterior purpose, as where a warrant is used to compel the withdrawal of a claim then in litigation.¹²⁷ Other illustrations are given in the note.¹²⁸

It is unfortunate that malicious prosecution has so frequently been confounded in the decisions with malicious use and abuse of process, since the distinction is important. Regular and legitimate use of process, though with a bad intention, is not a malicious abuse of process. The mere institution of a suit is not enough. The action lies for the improper use of process after it has been issued, not for

tachments levied on real estate worth many times the amount of the claim and on personal property valued at about \$100,000); *Rossiter v. Minnesota Bradner-Smith Paper Co.*, 37 Minn. 296, 33 N. W. 855 (malicious levy on exempt property); *Churchill v. Siggers*, 3 Ellis & B. 929 (malicious issuance of a writ in excess of the amount due and arrest thereunder).

¹²⁴ *Malone v. Belcher*, 216 Mass. 209, 103 N. E. 637, 49 L. R. A. (N. S.) 753, Ann. Cas. 1915A, 830.

¹²⁵ *Wood v. Graves*, 144 Mass. 365, 367, 11 N. E. 567, 59 Am. Rep. 95.

¹²⁶ *GRAINGER v. HILL*, 4 Bing. N. C. 212, 7 L. J. C. P. 85, 5 Scott, 561, 33 E. C. L. 695, Chapin Cas. Torts, 297.

¹²⁷ *Foy v. Barry*, 87 App. Div. 291, 84 N. Y. Supp. 335.

¹²⁸ *White v. Apsley Rubber Co.*, 181 Mass. 339, 63 N. E. 885; *Dishaw v. Wadleigh*, 15 App. Div. 205, 44 N. Y. Supp. 207; *Lockhart v. Bear*, 117 N. C. 298, 23 S. E. 484. And see *Nix v. Goodhill*, 95 Iowa, 282, 63 N. W. 701, 58 Am. St. Rep. 434 (levy on exempt earnings

maliciously causing process to be issued.¹²⁹ In malicious prosecution, as has been seen, lack of probable cause must be proved, and the proceeding must have terminated. On the other hand, while there may have been probable cause for instituting the proceeding, and the latter may still be pending, the process may have been used oppressively, or to effect a purpose not within its scope.¹³⁰

But, though it is established that the proceeding need not have terminated,¹³¹ it has been said that probable cause must be negatived.¹³² What is probably meant is that, though there may have been probable cause for the original proceeding, there should have been none for the specific acts of which complaint is made.¹³³

for the purpose of harassing debtor's employers and thereby compel him to pay to avoid discharge).

¹²⁹ *Dickerson v. Schwabacher*, 177 Ala. 371, 58 South. 986; *Bonney v. King*, 201 Ill. 47, 66 N. E. 377; *Bartlett v. Christhilf*, 69 Md. 219, 14 Atl. 518; *Wright v. Harris*, 160 N. C. 542, 76 S. E. 489.

¹³⁰ *Page v. Cushing*, 38 Me. 523; *Zinn v. Rice*, 154 Mass. 1, 27 N. E. 772, 12 L. R. A. 288; *Pittsburg, J., E. & E. R. Co. v. Wakefield Hardware Co.*, 143 N. C. 54, 55 S. E. 422; *GRAINGER v. HILL*, 4 Bing. N. C. 212, 7 L. J. C. P. 85, 5 Scott, 561, 33 E. C. L. 695, *Chapin Cas. Torts*, 297.

¹³¹ See cases cited in previous note; also *Dishaw v. Wadleigh*, 15 App. Div. 205, 44 N. Y. Supp. 207; *Lockhart v. Bear*, 117 N. C. 298, 23 S. E. 484.

¹³² *Nix v. Goodhill*, 95 Iowa, 282, 63 N. W. 701, 58 Am. St. Rep. 434; *Malone v. Belcher*, 216 Mass. 209, 103 N. E. 637, 49 L. R. A. (N. S.) 753, *Ann. Cas.* 1915A, 830.

¹³³ Cf. *Hearn v. Shaw*, 72 Me. 187, 193. "We should be careful to observe a distinction between suing out a writ and the improper use of the writ after it is issued." *Nix v. Goodhill*, 95 Iowa, 282, 284, 63 N. W. 701, 58 Am. St. Rep. 434. But the court does not appear to have given this effect.

UNAUTHORIZED SUIT IN ANOTHER'S NAME

102. To bring suit in another's name without his authority constitutes an actionable wrong, if damage is caused thereby.

Lack of probable cause is not required to be shown, since this tort is based upon the improper use of another's name in prosecuting a suit by which the nominal plaintiff¹³⁴ or the defendant¹³⁵ therein was injured. Nor is proof of malice essential. "If the party supposes he has authority to commence a suit, when in fact he has none, and the nominal plaintiff does not adopt it, the action fails for want of such authority. In such case, though the party supposed he had authority, and acted upon that supposition, without malice, still, if the defendant suffers injury by reason of the prosecution of the unauthorized suit against him, he may maintain an action for the actual damage sustained by him, in the loss of time, and for money paid to procure the discontinuance of the suit, but nothing more. Where, however, in addition to a want of authority, the suit commenced was altogether groundless, and was prosecuted with malicious motives, which may be inferred from there existing no right of action, as well as proved in other ways, then, in addition to the actual loss of time and money, the party may recover damages for the injury inflicted on his feelings and reputation."¹³⁶

¹³⁴ *Metcalf v. Alley*, 24 N. C. 38; *Hackett v. McMillan*, 112 N. C. 513, 17 S. E. 433, 21 L. R. A. 862.

¹³⁵ See cases cited in succeeding note.

¹³⁶ *BOND v. CHAPIN*, 8 Metc. (Mass.) 31, 33, *Chapin Cas. Torts*, 298, per Hubbard, J. See *Moulton v. Lowe*, 32 Me. 466; *Smith v. Hyndman*, 10 Cush. (Mass.) 554; *Streeper v. Ferris*, 64 Tex. 12. See Code Civ. Proc. N. Y. §§ 1900, 1901, giving a cause of action to the defendant in the original suit and to the party whose name was used; the former being allowed treble damages, and the latter his actual damages and \$250 in addition. But the former action must have been commenced or continued "vexatiously or maliciously." Cf. *Hawes v. Dunlop*, 136 App. Div. 629, 121 N. Y. Supp. 380.

MAINTENANCE AND CHAMPERTY

103. "Maintenance [is] an officious intermeddling in a suit that noways belongs to one by maintaining or assisting either party with money or otherwise to prosecute or defend it,"¹³⁷ and an action may be maintained at common law to recover damages therefor. Champerty "is a species of maintenance, * * * being a bargain with a plaintiff or defendant *campum partire* to divide the land or other matter sued for between them, if they prevail at law, whereupon the champerter is to carry on the party's suit at his own expense."¹³⁸

Maintenance and champerty were at one time of some importance, owing to the practices of a class of nobles, who by their great power and influence could overawe the courts and pervert the course of justice.¹³⁹ But, conditions having changed, actions based thereon are not now frequent.¹⁴⁰ Indeed, it has been doubted in some states,¹⁴¹ and in others denied,¹⁴² that the common-law doctrine of champerty or maintenance ever formed part of their jurisprudence,

¹³⁷ 4 Blackstone's Comm. 134 (quoted in *Vaughan v. Marable*, 64 Ala. 60, 66; *Joy v. Metcalf*, 161 Mass. 514, 515, 37 N. E. 671); 2 Story, Eq. Jur. § 1048 (quoted in *Spicer v. Jarrett*, 2 Baxt. [Tenn.] 454, 457).

¹³⁸ 4 Blackstone's Comm. 135 (quoted in *Duke v. Harper*, 2 Mo. App. 1, 4); 2 Story, Eq. Jur. § 1048 (quoted in *Spicer v. Jarrett*, 2 Baxt. [Tenn.] 454, 457). Readers of Samuel Warren's novel, "Ten Thousand a Year," will remember how "Mr. Quirk had, as well as Mr. Gammon, cast many an anxious eye" on these passages during their negotiations with the supposed owner of Yatton.

¹³⁹ *Sedgwick v. Stanton*, 14 N. Y. 289, 297.

¹⁴⁰ *Goodyear Dental Vulcanite Co. v. White*, 10 Fed. Cas. No. 5,602; *Fletcher v. Ellis*, 9 Fed. Cas. No. 4,863a; *Bradlaugh v. Newdegate*, 11 Q. B. D. 1, 52 L. J. Q. B. 454, 31 Wkly. Rep. 792.

¹⁴¹ *Richardson v. Rowland*, 40 Conn. 565; *Willey v. Crane*, 63 Mich. 720, 30 N. W. 327; *Sedgwick v. Stanton*, 14 N. Y. 289; *Browne v. West*, 9 App. Div. 135, 41 N. Y. Supp. 146.

¹⁴² *Mathewson v. Fitch*, 22 Cal. 86; *Schomp v. Schenck*, 40 N. J. Law, 195, 29 Am. Rep. 219.

though in some statutes have been passed which preserve in part the ancient rule.¹⁴³

While it is *prima facie* unlawful for a stranger to a litigation to take the quarrel upon himself and make it his own, an exception was early recognized in cases where one has maintained the suit "of his near kinsman, servant, or poor neighbor out of charity and compassion."¹⁴⁴ In a sense, therefore, lack of malice may be a defense, although proof of a malicious motive is not deemed essential. Nor need lack of probable cause for the original action or defense be shown. As maintenance contemplates an officious interference, it will not be established as against one who had an interest in the subject-matter of the action,¹⁴⁵ or honestly believed that he had.¹⁴⁶

By the weight of authority, agreements between attorney and client by which the former undertakes to render professional services for which he is to be paid out of the thing recovered are not champertous, where the attorney has not assumed payment of the costs and expenses of the litigation.¹⁴⁷ In some states the matter is governed by statute.¹⁴⁸

¹⁴³ See *Wightman v. Catlin*, 113 App. Div. 24, 98 N. Y. Supp. 1071.

¹⁴⁴ Blackstone's Comm. vol. 4, p. 135; *Harris v. Briscoe*, 17 Q. B. D. 504.

¹⁴⁵ *Guy v. Churchill*, 40 Ch. D. 481.

¹⁴⁶ See *Lewis v. Broun*, 36 W. Va. 1, 14 S. E. 444.

¹⁴⁷ *Meeks v. Dewberry*, 57 Ga. 263; *GEER v. FRANK*, 179 Ill. 570, 53 N. E. 965, 45 L. R. A. 110, Chapin Cas. Torts, 300; *Aultman v. Waddle*, 40 Kan. 195, 19 Pac. 730; *Omaha & R. V. Ry. Co. v. Brady*, 39 Neb. 27, 57 N. W. 767; *Pittsburg, C., C. & St. L. Ry. Co. v. Volkert*, 58 Ohio St. 362, 50 N. E. 924. But in the following an agreement to pay costs and fees was upheld: *Grace v. Floyd*, 104 Miss. 613, 61 South. 694; *Smits v. Hogan*, 35 Wash. 290, 77 Pac. 390, 1 Ann. Cas. 297.

¹⁴⁸ *McCoy v. Gas Engine & Power Co.*, 152 App. Div. 642, 137 N. Y. Supp. 591.

CHAPTER XIX

NEGLIGENCE

- 104. Definition.
- 105. Elements—Duty to Exercise Care.
- 106. Duty of Occupant of Land.
- 107. Duty of Maker or Vendor of Chattel.
- 108. Duty of Keeper of Animals.
- 109. Standard of Care.
- 110. Of Innkeeper and Common Carrier.
- 111. Determining Standard of Care—*Res Ipsa Loquitur*.
- 112. Damage.
- 113. . Contributory Negligence.

DEFINED

104. Negligence consists in failing to fulfill a legal duty to exercise a proper degree of care, whereby damage results to one to whom such legal duty is owing.

It is manifestly impossible to define this tort with any degree of exactness, since no fixed rule of duty can be established which will be applicable to all cases. The standard of care must be determined by the circumstances of each. A course of conduct consistent with the exercise of proper care under some conditions might under others exhibit the grossest negligence.¹

Negligence, being a mere omission to exercise proper precaution, must be distinguished from intentional wrongs, whether the intent be actual or constructive. It presupposes culpable inadvertence, and is therefore inconsistent with the thought of malice or design.² Hence such ex-

¹ See *Pennsylvania R. Co. v. Coon*, 111 Pa. 430, 440, 3 Atl. 234. Definitions are collected in 29 Cyc. 415 et seq.

² *Indiana, B. & W. Ry. Co. v. Overton*, 117 Ind. 253, 20 N. E. 147; *O'Brien v. Loomis*, 43 Mo. App. 29; *Proctor v. Southern Ry.*, 61 S. C. 170, 39 S. E. 351; *Id.*, 64 S. C. 491, 42 S. E. 427. "Where an intention to commit the injury exists, whether that intention be actual or constructive only, the wrongful act ceases to be merely negligent

pressions as "willful negligence,"³ or "wanton negligence,"⁴ are really contradictions in terms. That the distinction is important is shown by the fact that contributory negligence will be no defense if the tort has been willful.⁵ So, exemplary damages are ordinarily refused where defendant has merely been guilty of negligence.⁶ To justify their award it has been said that the evidence must disclose "that

injury and becomes one of violence or aggression." *Pennsylvania Co. v. Sinclair*, 62 Ind. 301, 306, 30 Am. Rep. 185.

³ *Bailey v. North Carolina R. Co.*, 149 N. C. 169, 62 S. E. 912; *Talbert v. Charleston & W. C. Ry.*, 75 S. C. 136, 55 S. E. 138. "When willfulness enters, negligence steps out. The former is characterized by advertence, and the latter by inadvertence." *Christy v. Butcher*, 153 Mo. App. 397, 401, 134 S. W. 1058, per Gray, J. "To say that an injury resulted from the negligent and willful conduct of another is to affirm that the same act is the result of two exactly opposite mental conditions. It is to affirm in one breath that an act was done through inattention, thoughtlessly, heedlessly, and at the same time purposely and by design." *Louisville, N. A. & C. Ry. Co. v. Bryan*, 107 Ind. 51, 54, 7 N. E. 807, per Mitchell, J.

⁴ *Bailey v. North Carolina R. Co.*, 149 N. C. 169, 62 S. E. 912. "There is a distinction between willfulness, wantonness, and recklessness. The first implies an act done intentionally, designedly. The second has various meanings; as applied to the subject in hand, action without regard to the rights of others, a conscious failure to observe care, a conscious invasion of the rights of others, willfully unrestrained action. The third, a disregard of consequences, an indifference whether a wrong or an injury is done or not, an indifference to the rights of others and of natural and probable consequences." *Jensen v. Denver & R. G. R. Co.* (1914) 44 Utah, 100, 138 Pac. 1185, 1189, per Straup, J. But it has been said that "a purpose or intent to injure is not an ingredient of wanton negligence. Where either of those exist, if damage ensues, the injury is willful. In wanton negligence, the party doing the act or failing to act is conscious of his conduct, and, without having the intent to injure, is conscious, from his knowledge of existing circumstances and conditions, that his conduct will likely or probably result in injury." *Birmingham Railway & Electric Co. v. Bowers*, 110 Ala. 328, 331, 20 South. 345, per Coleman, J. In accord, *Memphis & C. R. Co. v. Martin*, 117 Ala. 367, 382, 23 South. 231.

⁵ *Taxicab & Touring Car Co. v. Cabaniss*, 9 Ala. App. 549, 63 South. 774; *Chicago, St. L. & P. R. Co. v. Bills*, 118 Ind. 221, 20 N. E. 775; *Kansas Pac. Ry. Co. v. Whipple*, 39 Kan. 531, 18 Pac. 730; *Magar*

⁶ *Moody v. McDonald*, 4 Cal. 297; *Louisville, N. A. & C. Ry. Co. v. Shanks*, 94 Ind. 598; *O'Brien v. Loomis*, 43 Mo. App. 29.

entire want of care which would raise the presumption of a conscious indifference to consequences.”⁷ Indeed, there can be no recovery whatever for negligence where damage is not shown,⁸ though nominal damages at least will be given for a willful invasion of a right.⁹

ELEMENTS—DUTY TO EXERCISE CARE

105. There are three elements necessary to the existence of negligence: (1) A duty on the part of defendant to protect the plaintiff from the injury of which he complains. (2) A failure to perform that duty. (3) An injury to the plaintiff through such failure.¹⁰

It has already been seen that the foundation of tort liability is the violation of a duty imposed by the law upon the defendant in favor of the plaintiff.¹¹ To justify a recovery for negligence, it must therefore be established that there was an obligation to exercise care toward the injured party.¹² For instance, in the absence of covenant, no duty rests upon the owner of premises not to let them in a dilapi-

v. Hammond, 183 N. Y. 387, 76 N. E. 474, 3 L. R. A. (N. S.) 1038; *Brendle v. Spencer*, 125 N. C. 474, 34 S. E. 634; *Bolin v. Chicago, St. P., M. & O. Ry. Co.*, 108 Wis. 333, 84 N. W. 446, 81 Am. St. Rep. 911.

⁷ *Milwaukee & St. Paul Ry. Co. v. Arms*, 91 U. S. 489, 495, 23 L. Ed. 374. In accord, *Alabama G. S. R. Co. v. Arnold*, 80 Ala. 600, 2 South. 337; *Wall v. Cameron*, 6 Colo. 275; *Chattanooga, R. & C. R. Co. v. Liddell*, 85 Ga. 482, 11 S. E. 853, 21 Am. St. Rep. 169; *Koestel v. Cunningham*, 97 Ky. 421, 30 S. W. 970.

⁸ See *supra*, p. 74; *infra*, p. 539.

⁹ *Koerber v. Patek*, 123 Wis. 453, 102 N. W. 40, 68 L. R. A. 956. Cf. *Wartman v. Swindell*, 54 N. J. Law, 589, 25 Atl. 356, 18 L. R. A. 44.

¹⁰ *Faris v. Hoberg*, 134 Ind. 269, 274, 33 N. E. 1028, 39 Am. St. Rep. 261.

¹¹ See *supra*, p. 7 et seq.

¹² *Atlanta & W. P. R. Co. v. West*, 121 Ga. 641, 49 S. E. 711, 67 L. R. A. 701, 104 Am. St. Rep. 179; *Flint & Walling Mfg. Co. v. Beckett*, 167 Ind. 491, 79 N. E. 503, 12 L. R. A. (N. S.) 924; *Tuttle v. Gilbert Mfg. Co.*, 145 Mass. 169, 13 N. E. 465; *Akers v. Chicago, St. P., M. & O. Ry. Co.*, 58 Minn. 540, 60 N. W. 669; *Prosser v. West Jersey & Seashore R. Co.*, 72 N. J. Law, 342, 63 Atl. 494; *Miller v. Woodhead*, 104 N. Y. 471, 11 N. E. 57.

dated or unsafe condition,¹³ unless there is some latent or concealed defect which he knows will render their occupation dangerous, and which is not known to the lessee, or discoverable by inspection, for in the latter event it is the duty of the lessor to make disclosure.¹⁴ Nor is the landlord bound to make repairs after leasing.¹⁵ If, however, he undertake to repair, he must exercise care in so doing,¹⁶ and "if the premises are rented for a public use, for which he knows that they are unfit and dangerous, he is guilty of negligence, and may become responsible to persons suffering injury while rightfully using them."¹⁷ Furthermore, a duty to exercise reasonable care exists with respect to that portion of the premises over which he retains control as a stairway, hall, or elevator for use in common by different tenants in the same building,¹⁸ and, as elsewhere stated,¹⁹

¹³ *Smith v. State, Use of Walsh*, 92 Md. 518, 48 Atl. 92, 51 L. R. A. 772; *Bowe v. Hunking*, 135 Mass. 380, 46 Am. Rep. 471, note; *Rhoades v. Seidel*, 139 Mich. 608, 102 N. W. 1025; *Towne v. Thompson*, 68 N. H. 317, 44 Atl. 492, 46 L. R. A. 748; *Johnston v. Nichols* (1915) 83 Wash. 394, 145 Pac. 417; *Lane v. Cox* (1897) L. R. 1 Q. B. 415. See *Jaffe v. Harteau*, 56 N. Y. 398, 15 Am. Rep. 438.

¹⁴ *Borggard v. Gale*, 205 Ill. 511, 68 N. E. 1063; *Cowen v. Sunderland*, 145 Mass. 363, 14 N. E. 117, 1 Am. St. Rep. 469; *Cesar v. Karutz*, 60 N. Y. 229, 19 Am. Rep. 164; *Anderson v. Hayes*, 101 Wis. 538, 77 N. W. 891, 70 Am. St. Rep. 930.

¹⁵ *Rhoades v. Seidel*, 139 Mich. 608, 102 N. W. 1025; *O'Brien v. Capwell*, 59 Barb. (N. Y.) 497; *Whitehead v. Comstock & Co.*, 25 R. I. 423, 56 Atl. 446.

¹⁶ *Mann v. Fuller*, 63 Kan. 664, 66 Pac. 627; *Gregor v. Cady*, 82 Me. 131, 19 Atl. 108, 17 Am. St. Rep. 466; *Gill v. Middleton*, 105 Mass. 477, 7 Am. Rep. 548.

¹⁷ *Barrett v. Lake Ontario Beach Imp. Co.*, 174 N. Y. 310, 314, 66 N. E. 968, 61 L. R. A. 829, per Gray, J. In accord, *Colorado Mortg. & Inv. Co. v. Giacomini*, 55 Colo. 540, 136 Pac. 1039, L. R. A. 1915B, 364; *Mead v. Baum*, 76 N. J. Law, 337, 69 Atl. 962; *Junkermann v. Tillyou Realty Co.*, 213 N. Y. 404, 108 N. E. 190, L. R. A. 1915F, 700.

¹⁸ *Sawyer v. McGillicuddy*, 81 Me. 318, 17 Atl. 124, 3 L. R. A. 458, 10 Am. St. Rep. 260; *Shea v. McEvoy* (1915) 220 Mass. 239, 107 N. E. 945; *McGinley v. Alliance Trust Co.*, 168 Mo. 257, 66 S. W. 153, 56 L. R. A. 334; *Dollard v. Roberts*, 130 N. Y. 269, 29 N. E. 104, 14 L. R. A. 238.

¹⁹ See p. 567 et seq.

he may be responsible if the premises are in such a condition as to constitute a nuisance.²⁰

DUTY OF OCCUPANT OF LAND

106. In determining what duty, if any, rests upon the occupant of premises, a division will be made into cases where the injured party is (1) a trespasser; (2) a licensee; (3) an invited person; (4) the owner or occupant of adjoining premises.

Trespassers

The trespasser must take the premises as he finds them. The landowner is under no obligation to see that they are in a safe condition. He owes the trespasser no duty of affirmative care, and is only bound to refrain from willful and wanton acts.²¹ If, therefore, he dig a pit at such a distance from the public highway that it will not be considered a nuisance, he will not be responsible to the trespasser who falls therein.²² Necessarily, however, this presupposes that the excavation was made in the exercise of a right to make proper use of the premises. A trespasser is not an outlaw, and the owner who resorts to such means of protection as pits, mantraps, and spring guns, which are calculated to destroy life or inflict grievous bodily harm, will incur the risk of a finding that his use has been unreason-

²⁰ *Miller v. Fisher*, 111 Md. 91, 73 Atl. 891, 50 L. R. A. (N. S.) 295; *Swords v. Edgar*, 59 N. Y. 28, 17 Am. Rep. 295; *Keeler v. Lederer Realty Corp.*, 26 R. I. 524, 59 Atl. 855.

²¹ *Whitney v. New York, N. H. & H. R. Co.*, 87 Conn. 623, 89 Atl. 269; *Lary v. Cleveland, C., C. & I. R. Co.*, 78 Ind. 323, 41 Am. Rep. 572; *Louisville & N. R. Co. v. Hurt* (Ky. 1890) 13 S. W. 275; *Maynard v. Boston & Maine R. Co.*, 115 Mass. 458, 15 Am. Rep. 119; *Hoberg v. Collins, Lavery & Co.* (1910) 80 N. J. Law, 425, 78 Atl. 166, 31 L. R. A. (N. S.) 1064; *Magar v. Hammond*, 183 N. Y. 387, 76 N. E. 474, 3 L. R. A. (N. S.) 1038.

²² *Knapp v. Doll* (1913) 180 Ind. 526, 103 N. E. 385; *Kohn v. Lovett*, 44 Ga. 251. Cf. *Kleinberg v. Schween*, 134 App. Div. 493, 119 N. Y. Supp. 239, affirmed 198 N. Y. 619, 92 N. E. 1089; *Beck v. Carter*, 68 N. Y. 283, 23 Am. Rep. 175.

able.²³ This is more than nonfeasance; it is aggression. Again, if the presence of the trespasser become known, an obligation may arise to refrain from the commission of acts otherwise lawful, or to exercise care in the doing thereof, where otherwise the trespasser would be subjected to injury. Thus, where an alleged intruder upon circus grounds was injured during the performance by the explosion of a giant firecracker, it was said: "The question of whether a dangerous experiment should be attempted in his presence, or whether an experiment should be conducted with due care and regard to his safety, cannot be made to depend upon whether he had forced himself into the tent."²⁴ Whether one is under a duty to anticipate the presence of an intentional trespasser is a point on which the courts are not in accord. The question has arisen chiefly in actions against railroads.²⁵ The better ground would appear to be

²³ *Hooker v. Miller*, 37 Iowa, 613, 18 Am. Rep. 18; *Burrill v. Alexander*, 75 N. H. 554, 78 Atl. 618; *Bird v. Holbrook*, 4 Bing. 628.

²⁴ *Herrick v. Wixom*, 121 Mich. 384, 388, 80 N. W. 117, 81 N. W. 333, per Montgomery, J. In accord, *Hector Mining Co. v. Robertson*, 22 Colo. 491, 45 Pac. 406; *Hall v. Missouri Pac. Ry. Co.*, 219 Mo. 553, 118 S. W. 56. Cf. *Rome Furnace Co. v. Patterson*, 120 Ga. 521, 48 S. E. 166; *Davis' Adm'r v. Ohio Valley Banking & Trust Co.*, 127 Ky. 800, 106 S. W. 843, 15 L. R. A. (N. S.) 402.

²⁵ Such duty was said to exist in *Brown v. Boston & M. R. R.*, 73 N. H. 568, 64 Atl. 194; *Jeffries v. Seaboard Air Line R. Co.*, 129 N. C. 236, 39 S. E. 836; *Pickett v. Wilmington & W. R. Co.*, 117 N. C. 616, 23 S. E. 264, 30 L. R. A. 257, 53 Am. St. Rep. 611; *Cincinnati & Z. R. Co. v. Smith*, 22 Ohio St. 227, 10 Am. Rep. 729. In some states this is made a statutory duty. See Pub. Acts Ark. 1911, p. 275, No. 284; *St. Louis S. W. R. Co. v. Russell*, 62 Ark. 182, 34 S. W. 1059; *Shannon's Code Tenn.* 1896, § 1574, subd. 4; *Patton v. Railway Co.*, 89 Tenn. 370, 15 S. W. 919, 12 L. R. A. 184. Contra, it has been said that the company has the right to a free track, "that it is not bound to any act or service in anticipation of trespassers thereon, and that the trespasser who ventures to enter upon the track for any purpose of his own assumes all risks of the conditions which may be found there including the operations of engines and cars." *Sheehan v. St. Paul & D. Ry. Co.*, 76 Fed. 201, 204, 22 C. C. A. 121. In accord, *Baltimore & O. R. Co. v. Welch*, 120 Md. 319, 87 Atl. 676; *Petur v. Erie R. Co.*, 151 App. Div. 578, 136 N. Y. Supp. 79, affirmed 208 N. Y. 615, 102 N. E. 1111. Cf. *Schug v. Chicago, M. & St. P. R. Co.*, 102 Wis. 515, 78 N. W. 1090.

that, if the place is one "where there is reasonable ground for expecting or anticipating the presence of persons, the presumption of a clear track is destroyed, and, even though the persons be trespassers, it does not relieve those in charge of the moving cars from keeping a careful lookout for the person so expected to be present at that point."²⁶ Such would be the case where the company was aware that persons were in the habit of crossing the tracks at a particular place which was not a public thoroughfare.²⁷ If it were a public crossing, there is, of course, no trespass involved, and a duty arises to exercise vigilance.²⁸

A child may be a trespasser, and by weight of authority it would seem that the above rules are as applicable to him as to an adult;²⁹ but in some states an exception is recognized in cases of what have been termed "attractive" or "alluring nuisances." Where the injured person is of tender years, the owner of the premises may be liable "if the things causing the injury have been left exposed and unguarded and are of such a character as to be an attraction to the child, appealing to his childish curiosity and instincts."³⁰

²⁶ *Fearons v. Kansas City Elevated R. Co.*, 180 Mo. 208, 223, 79 S. W. 394, per Fox, J. In accord, *Shaw v. Georgia R. R.*, 127 Ga. 8, 55 S. E. 960; *Cincinnati, N. O. & T. P. Ry. Co. v. Blankenship*, 157 Ky. 699, 163 S. W. 1123; *Fleming v. Louisville & N. R. Co.*, 106 Tenn. 374, 61 S. W. 58; *Blankenship v. Chesapeake & O. Ry. Co.*, 94 Va. 449, 27 S. E. 20; *Garner v. Trumbull*, 94 Fed. 321, 36 C. C. A. 361.

²⁷ *Green v. Chicago & W. M. Ry. Co.*, 110 Mich. 648, 68 N. W. 988; *Byrne v. New York Cent. & H. R. R. Co.*, 104 N. Y. 362, 10 N. E. 539, 58 Am. Rep. 512. See *Meltzner v. Baltimore & O. R. Co.* (1909) 224 Pa. 352, 73 Atl. 434.

²⁸ *Florida Cent. & P. R. Co. v. Williams*, 37 Fla. 406, 90 South. 558; *Baltimore & O. R. Co. v. Owings*, 65 Md. 502, 5 Atl. 329; *Urbas v. Duluth, M. & N. Ry. Co.*, 113 Minn. 309, 129 N. W. 513; *Rafferty v. Erie R. Co.*, 66 N. J. Law, 444, 49 Atl. 456; *Norton v. North Carolina R. Co.*, 122 N. C. 910, 29 S. E. 886.

²⁹ *Louisville & N. R. Co. v. Logsdon's Adm'r*, 118 Ky. 600, 81 S. W. 657; *Morrissey v. Eastern R. Co.*, 126 Mass. 377, 30 Am. Rep. 686n; *Moore v. Pennsylvania R. Co.*, 99 Pa. 301, 44 Am. Rep. 106; *Felton v. Aubrey*, 74 Fed. 350, 20 C. C. A. 436. But see *Snare & Triest Co. v. Friedman*, 169 Fed. 1, 94 C. C. A. 369, 40 L. R. A. (N. S.) 367.

³⁰ *City of Pekin v. McMahon*, 154 Ill. 141, 147, 39 N. E. 484, 27 L. R. A. 206, 45 Am. St. Rep. 114.

Though the application of the doctrine has not been limited to machinery,⁸¹ it is chiefly with respect thereto that the question has arisen,⁸² and in a considerable proportion of the cases the injury was caused by a railroad turntable.⁸³ As will be observed, it "rests upon the conversion of the infant trespasser into an innocently baited victim."⁸⁴ Recognizing its unfairness to the landowner, whose use of the premises is thus unreasonably restricted,⁸⁵ for what is there that the average child may not convert into a plaything?

⁸¹ *Kopplekom v. Colorado Cement-Pipe Co.* (1901) 16 Colo. App. 274, 64 Pac. 1047, 54 L. R. A. 284 (cement tubing); *City of Pekin v. McMahon*, *supra* (pond); *Osborn v. Atchison, T. & S. F. Ry. Co.*, 86 Kan. 440, 121 Pac. 364 (dilapidated building); *Cœur d'Alene Lumber Co. v. Thompson*, 215 Fed. 8, 131 C. C. A. 316, L. R. A. 1915A, 731 (well).

⁸² *Nashville Lumber Co. v. Busbee*, 100 Ark. 76, 139 S. W. 301, 38 L. R. A. (N. S.) 754; *Smith v. Marion Fruit Jar & Bottle Co.*, 84 Kan. 551, 114 Pac. 845; *Chesko v. Delaware & Hudson Co.*, 218 Fed. 804, 134 C. C. A. 492.

⁸³ *Welk v. Southern Pac. Co.* (1913) 21 Cal. App. 711, 132 Pac. 775; *Edgington v. Burlington C. R. & N. Ry. Co.*, 116 Iowa, 410, 90 N. W. 95, 57 L. R. A. 561; *Kansas Cent. Ry. Co. v. Fitzsimmons*, 22 Kan. 686, 31 Am. Rep. 203; *O'Malley v. St. Paul, M. & M. Ry. Co.*, 43 Minn. 289, 45 N. W. 440; *Sioux City & P. R. Co. v. Stout*, 17 Wall. 657, 21 L. Ed. 745.

⁸⁴ *Burdick on Torts* (3d Ed.) 526.

⁸⁵ But see *Thompson on Negligence*, vol. 1, § 1026. With reference to the view that the property owner owes no greater measure of duty to the child trespasser, the learned author observes: "This cruel and wicked doctrine, unworthy of a civilized jurisprudence, puts property above humanity, leaves entirely out of view the tender years and infirmity of understanding of the child, indeed his inability to be a trespasser in sound legal theory, and visits upon him the consequences of his trespass just as though he were an adult."

To this, however, it may be urged that recovery is not denied an adult trespasser by way of punishment, but "because the landowner owed him no duty to have the premises in safe condition for his entry. Why should the moral innocence of a childish intruder raise a duty on the part of the landowner which is not created by the moral innocence of an adult intruder? The youthful innocence of the child does not make restrictions on the right of user less damaging to the owner, or make the alleged duty of preventing the entrance of an intruder, or of protecting him from harm after entry, less burdensome than in the case of an adult. Indeed the duty would be more onerous in the case of a child." "Liability of Landowners

there is a strong tendency on the part of many courts which have adopted it to limit its application,⁸⁶ and by the weight of authority it is repudiated.⁸⁷

Licensees

A licensee goes upon the premises for his own purposes and with the permission of the occupant, express or implied. For instance, one is a licensee who calls for the purpose of inquiring as to the character of a servant, where he upon whom the call is made is not engaged in keeping a registry

to Children Entering Without Permission," by Prof. Jeremiah Smith, 11 Harv. L. Rev. 349, 434, at page 368.

⁸⁶ *Peters v. Bowman*, 115 Cal. 345, 47 Pac. 113, 598, 56 Am. St. Rep. 106; *Savannah, F. & W. Ry. Co. v. Beavers*, 113 Ga. 398, 39 S. E. 82, 54 L. R. A. 314; *Stendal v. Boyd*, 73 Minn. 53, 75 N. W. 735, 42 L. R. A. 288, 72 Am. St. Rep. 597, note; *Louisville & N. R. Co. v. Ray*, 124 Tenn. 16, 134 S. W. 858, Ann. Cas. 1912D, 910.

⁸⁷ "We have only to add that every man who leaves a wheelbarrow or a spade upon his lawn, a rake with its sharp teeth pointing upward, upon the ground or leaning against a fence, a bed of mortar prepared for use in his new house, a wagon in his barnyard, upon which children may climb and from which they may fall, or who turns in his lot a kicking horse or a cow with calf, does so at the risk of having the question of his negligence left to a sympathetic jury. How far does this rule go? Must his barn door and the usual apertures through which the accumulations of the stable are thrown be kept locked and fastened, lest 12 year old boys get in and be hurt by the animals, or by climbing into the haymow and falling from beams? May a man keep a ladder or a grindstone or a scythe or a plow or a reaper without danger of being called upon to reward trespassing children whose parents owe and may be presumed to perform the duty of restraint? Does the new rule go still further, and make it necessary for a man to fence his gravel pit or quarry? And, if so, will an ordinary fence do, in view of the known propensity and ability of boys to climb fences? Can a man nowadays safely own a small lake or fish pond? And must he guard ravines and precipices upon his land?" *Ryan v. Towar*, 128 Mich. 463, 470, 87 N. W. 644, 55 L. R. A. 310, 92 Am. St. Rep. 481, per Hooker, J. In accord, *Wilmot v. McPadden*, 79 Conn. 367, 65 Atl. 157, 19 L. R. A. (N. S.) 1101; *Daniels v. New York & N. E. R. Co.*, 154 Mass. 349, 28 N. E. 283, 13 L. R. A. 248, 26 Am. St. Rep. 253; *FROST v. EASTERN R. R.*, 64 N. H. 220, 9 Atl. 790, 10 Am. St. Rep. 396, Chapin Cas. Torts, 303; *Delaware, L. & W. R. Co. v. Reich*, 61 N. J. Law, 635, 40 Atl. 682, 41 L. R. A. 831, 68 Am. St. Rep. 727; *Walsh v. Fitchburg R. Co.*, 145 N. Y. 301, 39 N. E. 1068, 27 L. R. A. 724, 45 Am. St. Rep. 615; *Paolino*

office, or in a similar business,³⁸ or who goes upon premises adjoining her own to seek her children, who are playing there.³⁹ So is a fireman who enters in case of fire.⁴⁰ Further illustrations are given in the note.⁴¹ It is the fact that the entry is made by the sufferance of the owner, express or implied, which distinguishes the licensee from the trespasser. It is the fact that the licensee has entered for his own purpose that marks the difference between him and the invited person. Hence it seems better to say that a social guest, though present at the invitation of the owner, is to be treated as a licensee, since he enjoys gratuitous hospitality.⁴² But it is otherwise where the question arises be-

v. McKendall, 24 R. I. 432, 53 Atl. 268, 60 L. R. A. 133, 96 Am. St. Rep. 736.

³⁸ *Plummer v. Dill*, 156 Mass. 426, 31 N. E. 128, 32 Am. St. Rep. 463.

³⁹ *Sterger v. Van Sicklen*, 132 N. Y. 499, 30 N. E. 987, 16 L. R. A. 640, 28 Am. St. Rep. 594.

⁴⁰ *Lunt v. Post Printing & Publishing Co.*, 48 Colo. 316, 110 Pac. 203, 30 L. R. A. (N. S.) 60, 21 Ann. Cas. 492; *Woodruff v. Bowen*, 136 Ind. 431, 34 N. E. 1113, 22 L. R. A. 198; *Eckes v. Stetler*, 98 App. Div. 76, 90 N. Y. Supp. 473; *Beehler v. Daniels Cornell & Co.*, 18 R. I. 563, 29 Atl. 6, 27 L. R. A. 512, 49 Am. St. Rep. 790.

⁴¹ *Dixon v. Swift*, 98 Me. 207, 56 Atl. 761; *Benson v. Baltimore Traction Co.*, 77 Md. 535, 26 Atl. 973, 20 L. R. A. 714, 39 Am. St. Rep. 436; *Norris v. Hugh Nawn Contracting Co.*, 206 Mass. 58, 91 N. E. 886, 31 L. R. A. (N. S.) 623, 19 Ann. Cas. 424; *Schiffer v. W. N. Sauer Co.*, 238 Pa. 550, 86 Atl. 479; *Larmore v. Crown Point Iron Co.*, 101 N. Y. 391, 4 N. E. 752, 54 Am. Rep. 718; *Muench v. Heinemann*, 119 Wis. 441, 96 N. W. 800.

⁴² Cf. *Bigelow on Torts* (8th Ed.) 160, 161; *Beven on Negligence*, pp. 31, 449, 450. In *Southcote v. Stanley*, 1 Hurl. & N. 247, Pollock, C. B., said that the guest was in a position analogous to that of a servant. For the time being he is a member of the establishment. In *Barman v. Spencer* (Ind. 1898) 49 N. E. 9, 44 L. R. A. 815, the host was held responsible to the guest for "gross negligence." Cf. *Converse v. Walker*, 30 Hun (N. Y.) 596. In *Davis v. Central Congregational Soc. of Jamaica Plain*, 129 Mass. 367, 37 Am. Rep. 368, where one attending a religious conference was held an invitee, it was said: "The application of the rule on which the defendant's liability depends is not affected by the consideration that this is a religious society and that the plaintiff came solely for her own benefit or gratification. It makes no difference that no pecuniary profit or other benefit was received or expected by the society. The fact that the plaintiff comes by invitation is enough to impose on the defendant

tween the guest of a tenant and the landlord, having control of a defective portion of the premises used in connection with the part leased, for here liability grows out of the contract of hiring.⁴³ Now the licensee, like the trespasser, enters upon the premises at his own risk. The owner or occupant must, of course, refrain from willfully inflicting injury; but he owes no duty to see that the land is in a safe condition.⁴⁴ He must not, however, *knowingly* allow the licensee to encounter a hidden peril, if there is a reasonable opportunity to give warning. For instance, where defendant had constructed a bridge on his own premises for his own use, which was also used by the public, with his knowledge, he was not responsible to one who was injured because the bridge was out of repair.⁴⁵ But he would be liable where he knew of the defective condition of the structure and saw the plaintiff about to enter thereon, but failed to warn him.⁴⁶ An-

the duty which lies at the foundation of this liability; and that, too, although the defendant, in giving the invitation, was actuated only by motives of friendship and Christian charity." It is difficult to reconcile this case with the general doctrine. The quoted statement, it is submitted, is broader than the facts warranted, for it would seem that the occupant of premises, who issues a call to attend a conference, celebration, or similar gathering there, is looking for some benefit. If, however, his motive be purely benevolent, there would appear no reason why he should be held to any greater liability than that of a licensor.

⁴³ "The contract impliedly included, not only the tenant himself. * * * It included all persons who, in connection with the use of the tenement by the tenant, might properly pass over the platform under the express authority of the tenant and in his right." *Coupe v. Platt*, 172 Mass. 458, 459, 52 N. E. 526, 70 Am. St. Rep. 293. Cf. *Brady v. Valentine*, 3 Misc. Rep. 20, 21 N. Y. Supp. 776, affirmed 144 N. Y. 698, 39 N. E. 856.

⁴⁴ *Indian Refining Co. v. Mobley*, 134 Ky. 822, 121 S. W. 657, 24 L. R. A. (N. S.) 497; *Graham v. Pocasset Mfg. Co.*, 220 Mass. 195, 107 N. E. 920; *Taylor v. Haddonfield & C. Turnpike Co.*, 65 N. J. Law, 102, 46 Atl. 707; *Fox v. Warner-Quinlan Asphalt Co.*, 204 N. Y. 240, 97 N. E. 497, 38 L. R. A. (N. S.) 395, Ann. Cas. 1913C, 745; *Monroe v. Atlantic Coast Line R. Co.*, 151 N. C. 374, 66 S. E. 315, 27 L. R. A. (N. S.) 193; *Beehler v. Daniels, Cornell & Co.*, 18 R. I. 563, 29 Atl. 6, 27 L. R. A. 512, 49 Am. St. Rep. 790.

⁴⁵ *Cusick v. Adams*, 115 N. Y. 55, 21 N. E. 673, 12 Am. St. Rep. 772.

⁴⁶ *Campbell v. Boyd*, 88 N. C. 129, 43 Am. Rep. 740. This case was

other modification of the general rule of nonliability is found where defendant's conduct has been such that the public has been led to use a way in the belief that it is a public street or way. He will here be held to be under a duty, towards one who makes use thereof, to exercise reasonable care to see that it is safe.⁴⁷

Invited Persons

"Invitation" is here used, not in the popular, but in the legal, sense as indicating that the entry was made for the benefit of the occupant,⁴⁸ or in the mutual interest of occupant and entrant.⁴⁹ For instance, one who enters a theater or place of amusement with a view to witnessing a performance or participating in the sports,⁵⁰ or an office, store, or place of business as a client, customer, or patron, whether the relation exists or is merely contemplated,⁵¹ or for

correctly decided, but on the wrong ground. The decision is based on invitation. There was no invitation, but mere permission. It has been said, however, that "to create a cause of action, something like fraud must be shown. No action will lie against a spiteful man who, seeing another running into a position of danger, merely omits to warn him." *Gautret v. Egerton*, L. R. 2 C. P. 371, 375, per Wills, J. But it was not shown here that the defendant was aware that the plaintiff was about to encounter the peril.

⁴⁷ *Holmes v. Drew*, 151 Mass. 578, 25 N. E. 22; *Brezee v. Powers*, 80 Mich. 172, 45 N. W. 130. Cf. *Beck v. Carter*, 68 N. Y. 283, 23 Am. Rep. 175.

⁴⁸ As in the following: *Mitton v. Cargill Elevator Co.*, 129 Minn. 449, 152 N. W. 753; *Id.*, 124 Minn. 65, 144 N. W. 434; *Glaser v. Rothschild*, 221 Mo. 180, 120 S. W. 1, 22 L. R. A. (N. S.) 1045, 17 Ann. Cas. 576.

⁴⁹ As in the following: *Rink v. Lowry* (1906) 38 Ind. App. 132, 77 N. E. 967; *Grill v. Gutfreund*, 65 Misc. Rep. 508, 120 N. Y. Supp. 86; *Hupfer v. Natl. Distilling Co.*, 114 Wis. 279, 90 N. W. 191; *Middleton v. P. Sanford Ross, Inc.*, 213 Fed. 6, 129 C. C. A. 622; *INDERMAUR v. DAMES* (1866) 1 C. P. 274, Chapin Cas. Torts, 308; *Holmes v. North Eastern Ry. Co.*, L. R. 6 Ex. 123.

⁵⁰ *Noack v. Wosslick*, 182 Ill. App. 425; *Hollis v. Kansas City, Mo., Retail Merchants' Ass'n*, 205 Mo. 508, 103 S. W. 32, 14 L. R. A. (N. S.) 284; *Barrett v. Lake Ontario Beach Imp. Co.*, 174 N. Y. 310, 66 N. E. 968, 61 L. R. A. 829.

⁵¹ *Pauckner v. Wakem*, 231 Ill. 276, 83 N. E. 202, 14 L. R. A. (N. S.) 1118; *Nave v. Flack*, 90 Ind. 205, 46 Am. Rep. 205; *Drennan v. Grady*, 167 Mass. 415, 45 N. E. 741; *Larkin v. O'Neill*, 119 N. Y.

other purposes connected with the business in which the owner or occupant is engaged,⁵² or which is there carried on with his permission,⁵³ does so pursuant to an invitation, as does a prospective tenant⁵⁴ or purchaser⁵⁵ of premises offered for rent or sale. But he is not an invited person as to a portion of the premises to which the invitation does not extend,⁵⁶ or when he uses the premises in a manner not authorized or for purposes of his own.⁵⁷ The owner's liability is only coextensive with his invitation. Nor, as it is generally held, is a mere failure to prohibit the entry upon property to be construed as an invitation.⁵⁸

One who invites another upon his premises (that is, "invites" in the legal sense of the term) is not an insurer of the lat-

221, 23 N. E. 563; *Swinarton v. Le Boutillier*, 7 Misc. Rep. 639, 28 N. Y. Supp. 53, affirmed 148 N. Y. 752, 43 N. E. 990.

⁵² *Huff v. Wells Fargo & Co.*, 141 Ill. App. 434; *Bell v. Houston & S. R. Co.*, 132 La. 88, 60 South. 1029, 43 L. R. A. (N. S.) 740; *Garfield & Proctor Coal Co. v. Rockland-Rockport Lime Co.*, 184 Mass. 60, 67 N. E. 863, 61 L. R. A. 946, 100 Am. St. Rep. 543. Cf. *Butler v. Chicago, R. I. & P. Ry. Co.* (1911) 155 Mo. App. 287, 136 S. W. 729.

⁵³ *Foren v. Rodick*, 90 Me. 276, 38 Atl. 175; *Larue v. Farren Hotel Co.*, 116 Mass. 67; *Swords v. Edgar*, 59 N. Y. 28, 17 Am. Rep. 295.

⁵⁴ *Kalus v. Bass*, 122 Md. 467, 89 Atl. 731, Ann. Cas. 1916A, 985; *Fogarty v. Bogart*, 59 App. Div. 114, 69 N. Y. Supp. 47. Cf. *Marston v. Reynolds*, 211 Mass. 590, 98 N. E. 601; *Withers v. Brooklyn Real Estate Exch.*, 106 App. Div. 255, 94 N. Y. Supp. 328.

⁵⁵ *Smith v. Jackson*, 70 N. J. Law, 183, 56 Atl. 118.

⁵⁶ *Fredenburg v. Baer*, 89 Minn. 241, 94 N. W. 683; *Menteer v. Scalzo Fruit Co.*, 240 Mo. 177, 144 S. W. 833; *Quantz v. Southern R. Co.*, 137 N. C. 136, 49 S. E. 79; *Flanagan v. Atlantic Alcatraz Asphalt Co.*, 37 App. Div. 476, 56 N. Y. Supp. 18; *Pierce v. Whitcomb*, 48 Vt. 127, 21 Am. Rep. 120; *Peake v. Buell*, 90 Wis. 508, 63 N. W. 1053, 48 Am. St. Rep. 946. Cf. *Glaser v. Rothschild*, 221 Mo. 180, 120 S. W. 1, 22 L. R. A. (N. S.) 1045, 17 Ann. Cas. 576.

⁵⁷ *Snow v. Coe Brass Mfg. Co.*, 80 Conn. 63, 66 Atl. 881; *La Veer v. Hanke Iron & Wire Works*, 187 Ill. App. 481; *New York & N. J. Tel. Co. v. Spelcher*, 59 N. J. Law, 23, 39 Atl. 661; *Ryerson v. Bathgate*, 67 N. J. Law, 337, 51 Atl. 708, 57 L. R. A. 307.

⁵⁸ *Pastorello v. Stone*, 89 Conn. 286, 93 Atl. 529; *Martin v. Louisville & J. Bridge Co.*, 41 Ind. App. 493, 84 N. E. 360; *Reardon v. Thompson*, 149 Mass. 269, 21 N. E. 369; *Akers v. Chicago, St. P., M. & O. Ry. Co.*, 58 Minn. 540, 60 N. W. 669. See *Hounsell v. Smyth*, 7 C. B. N. S. 731.

ter's safety,⁵⁹ but he must exercise ordinary care and prudence to keep the property in a safe condition.⁶⁰

Duty to Owner or Occupant of Adjoining Premises

In the leading case of *Rylands v. Fletcher*, where water from defendant's reservoir had flowed into plaintiff's colliery, in holding defendant liable, the true rule of law was said to be that "the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and if he does not do so is *prima facie* answerable for all the damage which is the natural consequence of its escape."⁶¹ The House of Lords having accepted this broad doctrine, it must be regarded as established in England. Nevertheless, the strong tendency in that country has been to discover exceptions and limitations.

⁵⁹ *Flynn v. Central R. Co. of N. J.*, 142 N. Y. 439, 37 N. E. 514.

⁶⁰ *John Thompson Grocery Co. v. Phillips* (1912) 22 Colo. App. 428, 125 Pac. 563; *Bell v. Central Natl. Bank of Washington*, 28 App. D. C. 580; *Branham's Adm'r v. Buckley*, 158 Ky. 848, 166 S. W. 618, Ann. Cas. 1915D, 861; *Hollander v. Hudson*, 152 App. Div. 131, 136 N. Y. Supp. 594. And see cases cited under preceding notes.

⁶¹ L. R. 3 H. L. 330, 339, by Cairns, L. C. J., and Cranworth, L. J., approving statement of Blackburn, J., in *Fletcher v. Rylands*, L. R. 1 Ex. 265, 279, who added: "He can excuse himself by showing that the escape was owing to the plaintiff's default, or perhaps that the escape was the consequence of vis major, or the act of God. * * * The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten by the escaping cattle of his neighbor, or whose mine is flooded by the water from his neighbor's reservoir, or whose cellar is invaded by the filth of his neighbor's privy, or whose habitation is made unhealthy by the fumes and noisome vapors of his neighbor's alkali works, is damaged without any fault of his own; and it seems but reasonable and just that the neighbor, who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbor's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequences. And upon authority this, we think, is established to be the law, whether the things so brought be beasts, or water, or filth, or stench."

For instance, in *Nichols v. Marsland*,⁶² where defendant had dammed a stream, the water of which escaped, owing to a rainfall more violent than could have been anticipated, and in *Box v. Jubb*,⁶³ where the overflow was caused by the emptying of a large quantity of water from the reservoir of a third party into defendant's reservoir, the courts reached a conclusion different from that in *Rylands v. Fletcher*.

It has been said that the law as laid down in *Rylands v. Fletcher* "is in direct conflict with the law as settled in this country."⁶⁴ The fallacy in the process of argument by which the House of Lords reached its conclusion, it has been observed, is that a rule applicable to a class of cases such as trespassing animals, which is to a great extent exceptional, "is amplified and extended into a general, if not universal, principle."⁶⁵ Unfortunately, the courts have frequently failed to distinguish clearly between the principle itself and its application to the facts in *Rylands v. Fletcher*. In so far as dams, reservoirs, and embankments are concerned, it is difficult to perceive much difference between the present English and American views. If the structure is of a strength sufficient to resist, not mere ordinary freshets alone, but such extraordinary floods as might reasonably have been anticipated,⁶⁶ the owner cannot properly be subjected to liability for damage which is the result of a peril not properly to be foreseen.⁶⁷ If, for the phrases "natural" or "non-natural" use, as employed by Lord Cairns, there are substituted "reasonable" or "unreasonable" user, it is submitted that, although the test remains

⁶² (1876) L. R. 2 Ex. Div. 1. ⁶³ (1879) L. R. 4 Ex. Div. 76.

⁶⁴ *Losee v. Buchanan*, 51 N. Y. 476, 487, 10 Am. Rep. 623.

⁶⁵ *MARSHALL v. WELWOOD*, 38 N. J. Law, 339, 341, 20 Am. Rep. 394, Chapin Cas. Torts, 314. Cf. "Responsibility for Tortious Acts," by Prof. John H. Wigmore, 7 Harv. Law Rev. 441, 454.

⁶⁶ *Gray v. Harris*, 107 Mass. 492, 9 Am. Rep. 61; *Mayor, etc., of City of New York v. Bailey*, 2 Denio (N. Y.) 433.

⁶⁷ *Everett v. Hydraulic Flume Tunnel Co.*, 23 Cal. 225; *Ohio & M. Ry. Co. v. Ramey*, 139 Ill. 9, 28 N. E. 1087, 32 Am. St. Rep. 176; *Fairbury Brick Co. v. Chicago, R. I. & P. Ry. Co.*, 79 Neb. 854, 113 N. W. 535, 13 L. R. A. (N. S.) 542; *Baltimore & O. R. Co. v. Sulphur Spring Independent School Dist.*, 96 Pa. 65, 42 Am. Rep. 529; *Lapham v. Curtis*, 5 Vt. 371, 26 Am. Dec. 310.

decidedly indefinite, it becomes clearer of comprehension.⁶⁸ Generally, the owner or occupant has made an unreasonable, and therefore "non-natural," use of his premises if he has brought thereon a thing the ordinary use of which is productive of injury. Here he properly assumes absolute liability. But "it is only those things the natural tendency of which is to become a nuisance or to do mischief if they escape, which their owner keeps at his peril."⁶⁹

The principle here is that "every owner shall refrain from these unwarrantable and extremely dangerous uses of property unless he provides safeguards whose perfection he guarantees."⁷⁰ This rule, for instance, is not applicable to the construction and maintenance of the walls of an ordinary building near the land of an adjacent owner; but it would apply to a wall forming part of the ruins of a building, which was likely to fall and in its fall do damage. To maintain the latter after the expiration of a proper time for investigation and removal would not be a reasonable use of one's own property,⁷¹ nor is it reasonable to erect a building so near to the street and of such a shape and character that snow and ice collected upon the roof must in the natural course of things be liable to slide down and fall upon the sidewalk, thereby exposing passers-by to the risk of injury,⁷² or to construct drains or gutters in such a manner as naturally to discharge water or sewage upon adjoining lands. Here the danger is so manifest that it seems better to say that there is an absolute duty to prevent the

⁶⁸ "The distinction made by Lord Cairns * * * between a natural and nonnatural use of land, if he meant anything more than the difference between a reasonable use and an unreasonable one, is not established in the law." *Brown v. Collins*, 53 N. H. 442, 448, 16 Am. Rep. 372, per Doe, J.

⁶⁹ *Berger v. Minneapolis Gaslight Co.*, 60 Minn. 296, 301, 62 N. W. 336, per Start, C. J.

⁷⁰ *AINSWORTH v. LAKIN*, 180 Mass. 397, 399, 62 N. E. 746, 57 L. R. A. 132, 91 Am. St. Rep. 314, *Chapin Cas. Torts*, 319, per Knowlton, J.

⁷¹ *AINSWORTH v. LAKIN*, *supra*.

⁷² *Shipley v. Fifty Associates*, 106 Mass. 194, 8 Am. Rep. 318.

harm from coming to pass.⁷³ Other illustrations will be found in the note.⁷⁴

Such cases are frequently decided on the theory of nuisance, which, of course, requires a consideration whether the use of the premises is reasonable or unreasonable.⁷⁵ Moreover, a distinction is made between injuries which are the result of intentional or voluntary acts and those which are unintentional or accidental. For example, one who without negligence operates a steam boiler upon his own property is not liable to his neighbor, on whose premises the boiler is thrown by an explosion;⁷⁶ but it is otherwise where dynamite is deliberately exploded, though with due care and for the purpose of improving the premises, and earth or stone are cast.⁷⁷ So where crude oil is carefully stored in tanks, which are maintained with proper care, there is no responsibility for damage due to fire following a leakage,⁷⁸ though the result would have been different, had the flame been thrown by a blast of powder in the course of quarrying stone.⁷⁹

⁷³ *Fitzpatrick v. Welch*, 174 Mass. 486, 55 N. E. 178, 48 L. R. A. 278; *Jutte v. Hughes*, 67 N. Y. 267. But the courts are not in accord. See *Huber v. Stark*, 124 Wis. 359, 102 N. W. 12, 100 Am. St. Rep. 937, 4 Ann. Cas. 340.

⁷⁴ Unreasonable user: *Brennan Construction Co. v. Cumberland*, 29 App. D. C. 554, 15 L. R. A. (N. S.) 535, 10 Ann. Cas. 865; *Ball v. Nye*, 99 Mass. 582, 97 Am. Rep. 56; *Cahill v. Eastman*, 18 Minn. 324 (Gil. 292) 10 Am. Rep. 184 (Cf. *Berger v. Minneapolis Gaslight Co.*, 60 Minn. 296, 62 N. W. 336); *Crowhurst v. Amersham Burial Board* (1908) L. R. 2 K. B. 14, 27 Wkly. Rep. 95. Cf. *West v. Bristol Tramways Co.* Reasonable user: *Langabaugh v. Anderson*, 68 Ohio St. 131, 67 N. E. 286, 62 L. R. A. 948.

⁷⁵ *Grady v. Wolsner*, 46 Ala. 381, 7 Am. Rep. 593; *Vaughan v. Bridgham*, 193 Mass. 392, 79 N. E. 739, 9 L. R. A. (N. S.) 695; *Berger v. Minneapolis Gaslight Co.*, 60 Minn. 296, 62 N. W. 336; *Davis v. Niagara Falls Tower Co.*, 171 N. Y. 336, 64 N. E. 4, 57 L. R. A. 545, 89 Am. St. Rep. 817.

⁷⁶ *Losee v. Buchanan*, 51 N. Y. 476, 10 Am. Rep. 623.

⁷⁷ *Sullivan v. Dunham*, 161 N. Y. 290, 55 N. E. 923, 47 L. R. A. 715, 76 Am. St. Rep. 274; *Hay v. Cohoes Co.*, 2 N. Y. 159, 51 Am. Dec. 279.

⁷⁸ *Langabaugh v. Anderson*, 68 Ohio St. 131, 67 N. E. 286, 62 L. R. A. 948.

⁷⁹ *City of Tiffin v. McCormack*, 34 Ohio St. 638, 32 Am. Rep. 408.

Lateral and Subjacent Support

A recognized duty which the owner or occupant owes to his neighbor is that of lateral or subjacent support. He is required to afford this support to adjoining land in its natural condition.⁸⁰ Its withdrawal will give rise to a cause of action which "does not depend on any want of care in the removal of the soil, but upon the violation of the right of property which has thus been invaded and disturbed."⁸¹ But there is no such duty with respect to structures erected thereon. Hence, in the absence of negligence, there can be no recovery against one who by digging upon his own premises has caused the building of his neighbor to fall, where the land would not have fallen had there been no building.⁸² If, however, the land would have sunk had there been no structure upon it, recovery is allowed in England for the total damage;⁸³ but in this country many courts have held defendant liable for the value of the building only if his negligence was established.⁸⁴ In England it has been held that a right to the lateral support of build-

⁸⁰ *Jones v. Wagner*, 66 Pa. 429, 5 Am. Rep. 385; *Richardson v. Vermont Central R. Co.*, 25 Vt. 465, 60 Am. Dec. 283.

⁸¹ *Jamison v. Myrtle Lodge No. 355*, A. F. & A. M., 158 Iowa, 264, 267, 139 N. W. 547, per Ladd, J. In accord, *West Pratt Coal Co. v. Dorman*, 161 Ala. 389, 49 South. 849, 23 L. R. A. (N. S.) 805, 135 Am. St. Rep. 127, 18 Ann. Cas. 750. Cf. *Gildersleeve v. Hammond*, 109 Mich. 431, 67 N. W. 519, 33 L. R. A. 46; *Walker v. Strosnider*, 67 W. Va. 39, 67 S. E. 1087, 21 Ann. Cas. 1. "Good or bad mining in no way affects the responsibility" *Noonan v. Pardee*, 200 Pa. 474, 482, 50 Atl. 255, 55 L. R. A. 410, 86 Am. St. Rep. 722.

⁸² Lateral support: *City of Quincy v. Jones*, 76 Ill. 231, 20 Am. Rep. 243; *Moellering v. Evans*, 121 Ind. 195, 22 N. E. 989, 6 L. R. A. 449; *Clemens v. Speed*, 93 Ky. 284, 19 S. W. 660, 19 L. R. A. 240; *Charless v. Rankin*, 22 Mo. 566, 66 Am. Dec. 624; *McGuire v. Grant*, 25 N. J. Law, 356, 67 Am. Dec. 49. Subjacent support: *Marvin v. Brewster Iron Mining Co.*, 55 N. Y. 538, 14 Am. Rep. 322. Cf. *Wilms v. Jess*, 94 Ill. 464, 34 Am. Rep. 242. No obligation exists to support the weight of a person lawfully upon the premises. *Pullan v. Stallman*, 70 N. J. Law, 10, 56 Atl. 116.

⁸³ *Stroyan v. Knowles*, 6 H. & N. 454.

⁸⁴ *Jamison v. Myrtle Lodge No. 355*, A. F. & A. M., 158 Iowa, 264, 139 N. W. 547; *Gilmore v. Driscoll*, 122 Mass. 199, 23 Am. Rep. 312; *Gildersleeve v. Hammond*, 109 Mich. 431, 67 N. W. 519, 33 L. R. A. 46; *McGettigan v. Potts*, 149 Pa. 155, 24 Atl. 198.

ings can be acquired by prescription,⁸⁵ but the American courts have generally refused to take this view.⁸⁶ "It is difficult," observed the Massachusetts Supreme Court,⁸⁷ "to see how the owner of a house can acquire by prescription a right to have it supported by adjoining land, inasmuch as he does nothing upon and has no use of that land, which can be seen or known or interrupted or sued for by the owner thereof, and therefore no assent of the latter can be presumed to the acquirement of any right in his land by the former."

DUTY OF MAKER OR VENDOR OF CHATTEL

107. Responsibility of maker or vendor to the ultimate user has been upheld, where the article is "imminently dangerous." But a broader rule seems preferable, viz. to enforce accountability where the article is reasonably certain to place life and limb in peril where negligently made.

It is a mooted question to what extent the manufacturer or vendor of a chattel owes to one other than his immediate vendee a duty to exercise care with respect to the condition of the article sold. Primarily this duty arises out of contract, and is only owing to the other party to the agreement; but it is evident that under certain conditions the law must give a broader interpretation to his obligation. For instance, A. sells or supplies to B. an article which, if defective, will in its ordinary or contemplated use prove dangerous to the user. B. in good faith sells or supplies the article to C., who, using it as contemplated, is injured. A. has omitted proper precautions in preparing the article for

⁸⁵ *Dalton v. Angus*, 6 App. Cas. 740.

⁸⁶ *Sullivan v. Zeiner*, 98 Cal. 346, 33 Pac. 209, 20 L. R. A. 730; *Mitchell v. Mayor, etc., of City of Rome*, 49 Ga. 19, 15 Am. Rep. 669; *Clemens v. Speed*, 93 Ky. 284, 19 S. W. 660, 19 L. R. A. 240; *Tunstall v. Christian*, 80 Va. 1, 56 Am. Rep. 581.

⁸⁷ *Gilmore v. Driscoll*, 122 Mass. 199, 23 Am. Rep. 312. The case did not, however, require the decision of this question.

the market or for use. It must be kept in mind that here the charge is purely one of negligence. It is not assumed that A. did in fact have knowledge of the defect,⁸⁸ or that the defect was purposely concealed, as by covering it with paint.⁸⁹ All that is asserted is that A. could have ascertained it, had he exercised reasonable care. May C. recover from A.?

There appears to be a growing tendency in favor of recognizing a cause of action, although the decisions are in the main somewhat unsatisfactory. The principle has been asserted in many cases that the negligence "of a manufacturer or vendor, which is imminently dangerous to the life or health of mankind" with respect "to the preparation or sale of an article intended to preserve, destroy, or affect human life, is actionable by third parties who suffer from the negligence."⁹⁰ Coming within the class of the "imminently" or "intrinsically" dangerous are drugs,⁹¹ foods,⁹² beverages,⁹³

⁸⁸ See *Lewis v. Terry*, 111 Cal. 39, 43 Pac. 398, 31 L. R. A. 220, 52 Am. St. Rep. 146; *Wellington v. Downer Kerosene Oil Co.*, 104 Mass. 64.

⁸⁹ *Ward v. Pullman Co.*, 138 Ky. 554, 128 S. W. 606; *Kuelling v. Roderick Lean Mfg. Co.*, 183 N. Y. 78, 75 N. E. 1098, 2 L. R. A. (N. S.) 303, 111 Am. St. Rep. 691.

⁹⁰ *Huset v. J. I. Case Threshing Machine Co.*, 120 Fed. 865, 870, 57 C. C. A. 237, 61 L. R. A. 303.

⁹¹ In the following a poison was negligently sold as a harmless medicine: *Norton v. Sewall*, 106 Mass. 143, 8 Am. Rep. 298; *Davis v. Guarneri*, 45 Ohio St. 470, 15 N. E. 350, 4 Am. St. Rep. 548; *Peters v. Johnson, Jackson & Co.*, 50 W. Va. 644, 41 S. E. 190, 57 L. R. A. 428, 88 Am. St. Rep. 909. Cf. *McCubbin v. Hastings*, 27 La. Ann. 713; *Fisher v. Golladay*, 38 Mo. App. 531. In *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455, the drug was wrongly labeled, which brings the case nearer to fraud. Cf. *Blood Balm Co. v. Cooper*, 83 Ga. 457, 10 S. E. 118, 5 L. R. A. 612, 20 Am. St. Rep. 324, where the label contained directions for use, and injury followed use as directed.

⁹² *Salmon v. Libby, McNeill & Libby*, 219 Ill. 421, 76 N. E. 573; *Craft v. Parker, Webb & Co.*, 96 Mich. 245, 55 N. W. 812, 21 L. R. A. 139; *Tomlinson v. Armour & Co.*, 75 N. J. Law, 748, 70 Atl. 314, 19 L. R. A. (N. S.) 923. Cf. *Bishop v. Weber*, 139 Mass. 411, 1 N. E. 154, 52 Am. Rep. 715.

⁹³ See *Watson v. Augusta Brewing Co.*, 124 Ga. 121, 52 S. E. 152, 1 L. R. A. (N. S.) 1178, 110 Am. St. Rep. 157.

and explosive substances.⁹⁴ In many of these cases the decision is made to depend upon this test.⁹⁵

To require that the article shall be "imminently" or "intrinsically" dangerous is to set up a rule difficult to apply. If interpreted at all strictly, the result is apt to be manifestly unfair. Liability cannot be limited to things which normally are implements of destruction. It is submitted that the New York Court of Appeals, in a recent decision,⁹⁶ holding the manufacturer of an automobile liable for injuries received by a purchaser from the retailer, due to a defective wheel, has announced the correct doctrine. "If," it is said, "the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully.

* * * There must be knowledge of a danger not merely possible, but probable. It is *possible* to use almost anything in a way that will make it dangerous, if defective. That is not enough to charge the manufacturer with a duty independ-

⁹⁴ See *Thornhill v. Carpenter-Morton Co.*, 220 Mass. 593, 108 N. E. 474; *Standard Oil Co. v. Parrish*, 145 Fed. 829, 76 C. C. A. 405.

⁹⁵ See, also, the following, held "imminently" or "intrinsically" dangerous; *Statler v. George A. Ray Mfg. Co.*, 195 N. Y. 478, 88 N. E. 1063 (coffee urn); *Bright v. Barnett & Record Co.*, 88 Wis. 299, 60 N. W. 418, 26 L. R. A. 524 (staging); *Tom v. Nichols-Fifield Shoe Mach. Co.*, 215 Fed. 881, 132 C. C. A. 221 (die-cutting machine). Cf. *Weiser v. Holzman*, 33 Wash. 87, 73 Pac. 797, 99 Am. St. Rep. 932 (champagne clder). Contra, *Berger v. Standard Oil Co.*, 126 Ky. 155, 103 S. W. 245, 11 L. R. A. (N. S.) 238 (lubricating oil); *Lebourdais v. Vitrified Wheel Co.*, 194 Mass. 341, 80 N. E. 482 (emery wheel); *McCaffrey v. Mossberg & Granville Mfg. Co.*, 23 R. I. 381, 50 Atl. 651, 55 L. R. A. 822, 91 Am. St. Rep. 637 (drop press); *Marquardt v. Ball Engine Co.*, 122 Fed. 374, 58 C. C. A. 462 (valve); *Bragdon v. Perkins-Campbell Co.*, 87 Fed. 109, 30 C. C. A. 567, 66 L. R. A. 924 (side saddle).

⁹⁶ *MacPHERSON v. BUICK MOTOR CO.*, 217 N. Y. 382, 389, 111 N. E. 1050, Ann. Cas. 1916C, 440, Chaplin Cas. Torts, 323, per Cardozo, J.

ent of his contract. Whether a given thing is dangerous may be sometimes a question for the court and sometimes a question for the jury. There must also be knowledge that in the usual course of events the danger will be shared by others than the buyer."⁹⁷

DUTY OF KEEPER OF ANIMALS

108. By the weight of authority the keeper is liable as insurer for injury due to the animal's vicious acts, where it is (1) of a dangerous species; or (2) the species not being dangerous, there is knowledge of the particular animal's vicious propensities. In other cases liability depends on negligence.

It has been seen that liability for trespassing cattle is absolute.⁹⁸ To determine responsibility for injuries due to the animal's vicious acts necessitates a division into

⁹⁷ In accord, *Keep v. National Tube Co.* (C. C.) 154 Fed. 121 (carbonic acid gas cylinder); *Heaven v. Pender*, L. R. 11 Q. B. D. 503 (staging). Cf. *Hasbrouck v. Armour & Co.*, 139 Wis. 357, 121 N. W. 157, 23 L. R. A. (N. S.) 876, holding that serious injury from the negligent dropping of a needle into a mixture from which toilet soap is made does not usually result in serious injury to the user. In *Krahn v. J. L. Owens Co.*, 125 Minn. 33, 145 N. W. 626, 51 L. R. A. (N. S.) 650 (pea thresher), it was observed that "one who manufactures and sells an article not ordinarily of a dangerous nature, which is calculated for use by others than the vendee, may be liable to a person, not the vendee, who uses it in the usual course of business, for injuries due to defects which render the use of the article dangerous to life or limb." The following conditions were said to be necessary to recovery: (1) The article must have been so defective as to be dangerous to life or limb. (2) Defendant knew of the defect, or at least that he should have known of it (here the jury found that defendant did know). (3) The defect was the proximate cause of the injury. (4) Ordinary observation on plaintiff's part would not discover the defect. (5) The article was intended for the purpose for which it was being used at the time of the injury. (6) Plaintiff was one of the class of persons by whom defendant contemplated the article would be used. Contra, *Cadillac Motor Car Co. v. Johnson*, 221 Fed. 801, 137 C. C. A. 279, L. R. A. 1915E, 287 (automobile); *Burkett v. Studebaker Bros. Mfg. Co.*, 126 Tenn. 467, 150 S. W. 421 (carriage).

⁹⁸ See *supra*, pp. 10, 347.

classes. By the weight of authority, "if, from the experience of mankind, a particular class of animals is dangerous, though individuals may be tamed, a person who keeps one of the class takes the risk of any damage it may do. If, on the other hand, the animal kept belongs to a class which, according to the experience of mankind, is not dangerous and not likely to do mischief, and if the class is dealt with by mankind on that footing, a person may safely keep such an animal, unless he knows that the particular animal that he keeps is likely to do mischief."⁹⁹ "Liability for safe-keeping depends not so much on the classification of animals into wild or domestic as upon their natural propensity for mischief. If they are ferocious and savage, like the lion, tiger, etc., the keeper is bound to know the danger incident to their confinement, and the mere charge of not having been so restrained as to avoid injury is tantamount to an allegation of negligence."¹⁰⁰ Here the owner or keeper is held as an insurer.¹⁰¹ On the other hand, if the animal is of a non-ferocious species, the owner or keeper will be held only upon proof of *scienter* or a knowledge of existing vicious propensities. Where this is established, by the weight of authority, liability is absolute and without regard to the degree of care with which the animal was guarded.¹⁰²

⁹⁹ *FILBURN v. PEOPLE'S PALACE & AQUARIUM CO.*, 25 Q. B. D. 258, 261, Chapin Cas. Torts, 330, per Bowen, L. J.

¹⁰⁰ *Parsons v. Manser*, 119 Iowa, 88, 92, 93 N. W. 86, 62 L. R. A. 132, 97 Am. St. Rep. 283, per Ladd, J.

¹⁰¹ *Hayes v. Miller*, 150 Ala. 621, 43 South. 818, 11 L. R. A. (N. S.) 748, 124 Am. St. Rep. 93 (wolf); *Copley v. Wills* (Tex. Civ. App. 1913) 152 S. W. 830 (monkey); *FILBURN v. PEOPLE'S PALACE & AQUARIUM CO.*, 25 Q. B. D. 258, Chapin Cas. Torts, 330 (elephant). But cf. *Parsons v. Manser*, 119 Iowa, 88, 93 N. W. 86, 62 L. R. A. 132, 97 Am. St. Rep. 283 (bees). See 97 Am. St. Rep. 287, note, and 11 L. R. A. (N. S.) 748, note. "The Responsibility at Common Law for the Keeping of Animals," by Thomas Bevan, 22 Harv. L. Rev. 465.

¹⁰² *Domm v. Hollenbeck*, 259 Ill. 382, 102 N. E. 782, Ann. Cas. 1914B, 1272 (dog); *Klenberg v. Russell*, 125 Ind. 531, 25 N. E. 596 (cow); *Twigg v. Ryland*, 62 Md. 380, 50 Am. Rep. 226 (dog); *Muller v. McKesson*, 73 N. Y. 195, 29 Am. Rep. 123 (dog); *Congress & E. Spring Co. v. Edgar*, 99 U. S. 645, 25 L. Ed. 487 (stag). Contra, *De Gray v. Murray*, 69 N. J. Law, 458, 55 Atl. 237 (but see *Emmons v. Stevane*,

Where *scienter* is not proven, the question is one of negligence.¹⁰³ In some states by statute the owner of a dog is made liable without proof of *scienter*.¹⁰⁴ If viciousness is manifested only under certain conditions, as when in heat or with young, there is no absolute duty to restrain at other times.¹⁰⁵

To constitute notice it is not essential that the animal should previously have done some injury. There is a popular delusion that "every dog is entitled to one bite." He has no such vested right.¹⁰⁶ A knowledge of viciousness may be brought home to owner or keeper in other ways. It is sufficient that the animal's previous acts are of such a character as to give notice that there is a disposition to commit the injury for which suit is brought.¹⁰⁷ Precise similarity is not required, since it is the propensity to commit the mischief that constitutes the danger.¹⁰⁸ Where the animal is of a species naturally vicious, or where *scienter* is

77 N. J. Law, 570, 73 Atl. 544, 24 L. R. A. [N. S.] 458, 18 Ann. Cas. 812); Worthen v. Love, 60 Vt. 285, 14 Atl. 461.

¹⁰³ Gary v. Arnold, 175 Ill. App. 365; Barnum v. Terpening, 75 Mich. 557, 42 N. W. 967; Healey v. Ballantine & Sons, 66 N. J. Law, 339, 49 Atl. 511; Farber v. Roginsky, 123 App. Div. 38, 107 N. Y. Supp. 755.

¹⁰⁴ See Leone v. Kelly, 77 Conn. 569, 60 Atl. 136, 1 Ann. Cas. 947; Faulkner v. Hall, 150 Ky. 416, 150 S. W. 506; Riley v. Harris, 177 Mass. 163, 58 N. E. 584; Fye v. Chapin, 121 Mich. 675, 80 N. W. 797.

¹⁰⁵ Tupper v. Clark, 43 Vt. 200; Barnes v. Lucille, Ltd., 96 L. T. Rep. N. S. 680. Cf. Elliott v. Herz, 29 Mich. 202; Van Etten v. Noyes, 128 App. Div. 406, 112 N. Y. Supp. 888.

¹⁰⁶ Warner v. Chamberlain, 7 Houst. (12 Del.) 18, 30 Atl. 638; Worth v. Gilling, 2 L. R. C. P. 1; Barnes v. Lucille, Ltd., 96 L. T. Rep. N. S. 680. See Brice v. Bauer, 108 N. Y. 428, 15 N. E. 695, 2 Am. St. Rep. 454.

¹⁰⁷ Cameron v. Bryan, 89 Iowa, 214, 56 N. W. 434; Rider v. White, 65 N. Y. 54, 22 Am. Rep. 600; Robinson v. Marino, 3 Wash. 434, 28 Pac. 752, 28 Am. St. Rep. 50. Cf. Strouse v. Leipl, 101 Ala. 433, 14 South. 667, 23 L. R. A. 622, 46 Am. St. Rep. 122; Domm v. Hollenbeck, 259 Ill. 382, 102 N. E. 782, Ann. Cas. 1914B, 1272.

¹⁰⁸ Where defendant's horse struck plaintiff with its fore feet, evidence is receivable of its propensity to injure mankind by kicking with its hind feet, defendant having knowledge thereof. Reynolds v. Hussey, 64 N. H. 64, 5 Atl. 458. In accord, Emmons v. Stevane, 77 N. J. Law, 570, 73 Atl. 544, 24 L. R. A. (N. S.) 458, 18 Ann. Cas. 812. Cf. Cockerham v. Nixon, 33 N. C. 269.

established, some courts apparently consider that the mere keeping is itself a wrong;¹⁰⁹ while others treat the owner or keeper as under a duty to guard at peril.¹¹⁰ Though identical results would seem to have been reached under both views, where injury has been accomplished through the vicious acts of the animal, neither would appear applicable where this was not the cause. For instance, suppose an elephant is being led along a highway. Its conduct is unexceptionable and in strict accord with the canons of propriety, yet a horse takes fright at its appearance. Now, it should not be deemed wrongful merely to own or keep an elephant. A menagerie is not *per se* a nuisance, nor otherwise unlawful. Hence liability here would really rest upon the keeper's negligence.¹¹¹

STANDARD OF CARE

109. It seems best to say that the standard of care is to be measured by the conduct of the ordinary man under similar circumstances.

Degree of Care

In *Coggs v. Bernard*¹¹² Lord Holt, C. J., divided negligence into three degrees: Slight, ordinary, and gross. The case merely involved the liability of a bailee, but this classification, as applied to negligence generally, is not without support,¹¹³ and the term "gross negligence" has been defended as indic-

¹⁰⁹ See *Woolf v. Chalker*, 31 Conn. 121, 81 Am. Dec. 175.

¹¹⁰ See *Marble v. Ross*, 124 Mass. 44.

¹¹¹ "To render the defendants liable for the damage that accrued, it would be necessary to show, not only that such is the effect of the appearance of an elephant upon horses in general, but also that the defendants knew or had notice of it; for, if it is conceded that the elephant is of a savage and ferocious nature, it does not necessarily follow that his appearance inspires horses with terror." *Scribner v. Kelley*, 38 Barb. (N. Y.) 14, 16. In accord, *Bostock-Ferari Amusement Co. v. Brocksmith*, 34 Ind. App. 566, 73 N. E. 281, 107 Am. St. Rep. 260.

¹¹² 2 Ld. Raym. 909.

¹¹³ *Astin v. Chicago, M. & St. P. Ry. Co.*, 143 Wis. 477, 128 N. W. 265, 31 L. R. A. (N. S.) 158.

ative of something more than a want of ordinary care,¹¹⁴ in which sense it is sometimes used in statutory provisions.¹¹⁵ But the weight of authority is opposed to the division into degrees. "It is plain," says a learned author,¹¹⁶ "that such refinements can have no useful place in the practical administration of justice. Negligence cannot be divided into three compartments by mathematical lines. Ordinary jurors, before whom, except in cases of admiralty, actions grounded on negligence are always tried, are quite incapable of understanding such refinements. * * * The sound view is that the classification of negligence as gross, ordinary, and slight indicates only that, under special circumstances, great care and caution are required, or only ordinary care, or only slight care. If the care demanded is not exercised, the case is one of negligence, and a legal liability is made out when the failure is shown."¹¹⁷ Such words as "gross" and "reckless," when applied to negligence, have properly no legal significance, being merely vituperative epithets.¹¹⁸

Hence, negligence may be said to consist "in the failure to exercise that degree of care under given circumstances which a person of ordinary prudence would exercise under

¹¹⁴ *Louisville & N. R. Co. v. McCoy*, 81 Ky. 403; *Galbraith v. West End St. Ry. Co.*, 165 Mass. 572, 43 N. E. 501; *Bolin v. Chicago, St. P. & O. Ry. Co.*, 108 Wis. 333, 84 N. W. 446, 81 Am. St. Rep. 911.

¹¹⁵ *Walther v. Southern Pac. Co.*, 159 Cal. 769, 116 Pac. 51, 37 L. R. A. (N. S.) 235; *Brown Store Co. v. Chattahoochee Lumber Co.*, 121 Ga. 809, 49 S. E. 839; *Clarke's Adm'r v. Louisville & N. R. Co.*, 101 Ky. 34, 39 S. W. 840, 36 L. R. A. 123; *Dimauro v. Linwood St. Ry. Co.*, 200 Mass. 147, 85 N. E. 894.

¹¹⁶ *Thompson on Negligence*, vol. 1, § 18.

¹¹⁷ To the same effect, *Colorado & S. Ry. Co. v. Webb*, 36 Colo. 224, 85 Pac. 683; *Raymond v. Portland R. Co.*, 100 Me. 529, 62 Atl. 602, 3 L. R. A. (N. S.) 94; *Young v. St. Louis, I. M. & S. Ry. Co.*, 227 Mo. 307, 332, 127 S. W. 19; *Perkins v. New York Cent. R. Co.*, 24 N. Y. 196, 82 Am. Dec. 281. Cf. *Steamboat New World v. King*, 16 How. 469, 14 L. Ed. 1019.

¹¹⁸ *Stringer v. Alabama Mineral R. Co.*, 99 Ala. 397, 13 South. 75; *McPheeters v. Hannibal & St. J. R. Co.*, 45 Mo. 22; *McAdoo v. Richmond & D. R. Co.*, 105 N. C. 140, 11 S. E. 316; *Mariner v. Smith*, 5 Helsk. (52 Tenn.) 208; *Wilson v. Brett*, 12 L. J. Exch. 264, 11 M. & W. 113.

similar circumstances.”¹¹⁹ “It is the phrase ‘under like circumstances’ that imposes upon the term ‘reasonable care’ both its limitations and its elasticity.”¹²⁰ These attendant circumstances measure the extent of the duty. “The greater the hazard, the more complete must be the exercise of care.”¹²¹ For example, conduct which would constitute negligence with respect to the care of a diamond might be extraordinary carefulness if the chattel were a horse; a driver cannot reasonably be held to the same degree of watchfulness along a deserted country road that he would be required to exercise in a city street, and while it might show great want of care to discharge a firearm in a crowded locality, no such conclusion might be drawn if this were done on an open prairie. Again, by the weight of authority, to board or alight from a moving car or vehicle,¹²² or to eject one therefrom,¹²³ may or may not be negligence, depending in large part upon the speed with which it was moving. So, in determining liability for damages due to fire started and maintained for a proper purpose, the dryness of the weather, velocity of the wind, and nearness

¹¹⁹ *Stedman v. O'Neill*, 82 Conn. 199, 205, 72 Atl. 923, 22 L. R. A. (N. S.) 1229, per Prentice, J. In accord, *Gatta v. Philadelphia, B. & W. R. Co.* (Del. 1911) 2 Boyce, 551, 83 Atl. 788, 791; *Kentucky & I. Bridge & R. Co. v. Shrader* (Ky. 1904) 80 S. W. 1094, 1095; *Pomerene Co. v. White*, 70 Neb. 171, 173, 97 N. W. 232; *Brown v. Oregon-Washington R. & Nav. Co.*, 63 Or. 396, 128 Pac. 38.

¹²⁰ *Raymond v. Portland R. Co.*, 100 Me. 529, 533, 62 Atl. 602, 3 L. R. A. (N. S.) 94, per Spear, J.

¹²¹ *GALVESTON CITY R. CO. v. HEWITT*, 67 Tex. 473, 478, 3 S. W. 705, 60 Am. Rep. 32, Chapln Cas. Torts, 332, per Stayton, J.

¹²² *Birmingham Ry., Light & Power Co. v. Girod*, 164 Ala. 10, 51 South. 242, 137 Am. St. Rep. 17; *Macon Ry. & Light Co. v. Castopulon* (1912) 11 Ga. App. 242, 75 S. E. 15; *Pennsylvania Co. v. Marion*, 123 Ind. 415, 23 N. E. 973, 7 L. R. A. 687, 18 Am. St. Rep. 330, *Weber v. Kansas City Cable Ry. Co.*, 100 Mo., 194, 12 S. W. 804, 13 S. W. 587, 7 L. R. A. 819, 18 Am. St. Rep. 541. Cf. *New Jersey Traction Co. v. Gardner*, 60 N. J. Law, 571, 38 Atl. 669; *Clinton v. Brooklyn Heights R. Co.*, 91 App. Div. 374, 86 N. Y. Supp. 932. And see 30 L. R. A. (N. S.) 270, note, for list of authorities.

¹²³ *Union Pac. Ry. Co. v. Mitchell*, 56 Kan. 324, 43 Pac. 244; *Murphy v. Union Ry. Co.*, 118 Mass. 228.

to inflammable matter are to be taken into consideration,¹²⁴ and in fixing the responsibility of one who places a gun or revolver in the hands of a child regard must be had to the age, capacity, and disposition of the latter and his familiarity with firearms.¹²⁵ In fact, when dealing with any instrumentality of a dangerous type, its nature will naturally be considered by the man of ordinary prudence, and he will bestow a proportionately high degree of care.¹²⁶ But, after all, this is merely the degree which circumstances demand.

Employments Requiring Skill

In determining whether defendant's conduct comes up to the standard of reasonable care, regard must be had to the fact that his situation or employment may call for ability not possessed by the ordinary individual. One who holds himself out as competent to perform skilled services may properly be made responsible for a degree of care

¹²⁴ *Harris v. Savage*, 70 Kan. 561, 79 Pac. 113; *Needham v. King*, 95 Mich. 303, 54 N. W. 891; *Hays v. Miller*, 70 N. Y. 112. And see 21 L. R. A. 255, note, for list of authorities. By the common law, if a house took fire, the owner was answerable for all injury thereby occasioned to others, unless it appeared that it was started by one for whose act he was not responsible. Vin. Abr. "Actions," B. This rule does not appear to have been applied to the owner of a field where the fire was kindled. *Bachelor v. Heagan*, 18 Me. 32. By St. 6 Anne, c. 31, § 6, the landowner was exempted from liability if the fire were accidental. This was followed by St. 14 Geo. III, c. 78, § 86.

¹²⁵ *Palm v. Iverson*, 117 Ill. App. 535; *Poland v. Earhart*, 70 Iowa, 285, 30 N. W. 637; *Johnson v. Glidden*, 11 S. D. 237, 76 N. W. 933, 74 Am. St. Rep. 795, note. Cf. *Meers v. McDowell*, 110 Ky. 926, 62 S. W. 1013, 53 L. R. A. 789, 96 Am. St. Rep. 475; *Dixon v. Bell*, 5 M. & S. 198.

¹²⁶ E. g.: *Electricity*, *Denson v. Georgia Ry. & Electric Co.*, 135 Ga. 132, 68 S. E. 1113; *Hausler v. Commonwealth Electric Co.*, 240 Ill. 201, 88 N. E. 561; *Kempf v. Spokane & Inland Empire R. Co.* (1914) 82 Wash. 263, 144 Pac. 77, L. R. A. 1915C, 405; *Wilbert v. Sheboygan L. P. & Ry. Co.*, 129 Wis. 1, 106 N. W. 1058, 116 Am. St. Rep. 931 (cf. *Braun v. Buffalo General Electric Co.*, 200 N. Y. 484, 94 N. E. 206, 34 L. R. A. [N. S.] 1089, 140 Am. St. Rep. 645, 21 Ann. Cas. 370); explosives, *Willson v. Colorado & S. Ry. Co.* (1914) 57 Colo. 303, 142 Pac. 174; *Hertz v. Chicago, Ind. & S. R. Co.*, 154 Ill. App. 80; *Clark v. E. I. Du Pont de Nemours Powder Co.* (1915) 94 Kan. 268, 146 Pac. 320, L. R. A. 1915E, 479.

which shall be proportioned to his peculiar undertaking.¹²⁷ The principle¹²⁸ has been differently phrased, but there would seem to be substantial concurrence, at least in this country, in holding that one who is engaged in an employment requiring special skill, e. g., an attorney¹²⁹ or physician,¹³⁰ assumes to possess and undertakes to exercise the ordinary or average degree of skill possessed and exercised by others engaged in the same profession in similar localities.¹³¹ If he measure up to this test, he is not liable for an unfortunate result, due to an error of judgment, since he does not guarantee success.

¹²⁷ Cf. *Lincoln v. Gay*, 164 Mass. 537, 42 N. E. 95, 49 Am. St. Rep. 480; *Van Nortwick v. Holbine*, 62 Neb. 147, 86 N. W. 1057; *Isham v. Post*, 141 N. Y. 100, 35 N. E. 1084, 23 L. R. A. 90, 38 Am. St. Rep. 766; *Nelson v. Harrington*, 72 Wis. 591, 40 N. W. 228, 1 L. R. A. 719, 7 Am. St. Rep. 900; *Wilson v. Brett*, 11 M. & W. 113.

¹²⁸ As applied to an optician, see *Price v. Ga Nun*, 11 Misc. Rep. 74, 32 N. Y. Supp. 801; to a pilot, see *The Tom Lysle* (D. C.) 48 Fed. 690.

¹²⁹ *Gambert v. Hart*, 44 Cal. 542; *Humboldt Bldg. Ass'n v. Ducker's Ex'r*, 111 Ky. 759, 64 S. W. 671; *Caverly v. McOwen*, 123 Mass. 574; *Gabbert v. Evans* (1914) 184 Mo. App. 283, 166 S. W. 635; *Rapuzzi v. Stetson*, 160 App. Div. 150, 145 N. Y. Supp. 455. But see *Purves v. Landell*, 12 C. & F. 91, where it was held that for the attorney to be liable he should have been "guilty of some misconduct, some fraudulent proceeding, or should be chargeable with gross negligence, or with gross ignorance. It is only upon one or the other of those grounds," said Lord Campbell (page 102), "that the client can maintain an action against the professional adviser."

¹³⁰ *Carpenter v. Walker*, 170 Ala. 659, 54 South. 60, Ann. Cas. 1912D, 863; *Gramm v. Boener*, 56 Ind. 497; *Peck v. Hutchinson*, 88 Iowa, 320, 55 N. W. 511; *Small v. Howard*, 128 Mass. 131, 35 Am. Rep. 363; *Leighton v. Sargent*, 27 N. H. 460, 59 Am. Dec. 388; *Pike v. Honsinger*, 155 N. Y. 201, 49 N. E. 760, 63 Am. St. Rep. 655; *Bigney v. Fisher*, 26 R. I. 402, 59 Atl. 72.

¹³¹ An examination of the foregoing cases will disclose that the qualification as to similar localities has been made with reference to physicians. It is submitted that it is equally applicable to lawyers. Some of the courts use the phrase "in the same place," or an equivalent. This, it would seem, is not accurate. *Gramm v. Boener*, 56 Ind. 497. Cf. *Pelky v. Palmer*, 109 Mich. 561, 67 N. W. 561.

STANDARD OF INNKEEPER AND CARRIER

110. Innkeepers and common carriers are, under certain circumstances, held liable, irrespective of negligence. At common law they are regarded practically as insurers of the goods intrusted to them by guests and shippers.

It has been seen that the liability of innkeeper and common carrier may be regarded as tortious or contractual.¹³² The former, while bound only to exercise reasonable care to safeguard the person of his guest,¹³³ is, by the prevailing view, liable for all loss or injury to the latter's goods when placed *infra hospitium*, except when occasioned by the fraud or neglect of the guest or by the act of God or of the public enemy.¹³⁴ But in many states this stringent rule has been modified by statute.¹³⁵ The common carrier¹³⁶ is under a similar common-law obligation.¹³⁷ He likewise will be ex-

¹³² See *supra*, p. 15 et seq.; *Louisville & N. R. Co. v. Warfield & Lee*, 129 Ga. 473, 59 S. E. 234. But cf. Keener on Quasi Contracts, p. 18, in which the view is taken that liability, being founded on the custom of the realm, is quasi contractual.

¹³³ *Patrick v. Springs*, 154 N. C. 270, 70 S. E. 395, Ann. Cas. 1912A, 1209; *Lyttle v. Denny*, 222 Pa. 395, 71 Atl. 841, 20 L. R. A. (N. S.) 1027, 128 Am. St. Rep. 814, 15 Ann. Cas. 924; *Weeks v. McNulty*, 101 Tenn. 495, 48 S. W. 809, 43 L. R. A. 185, 70 Am. St. Rep. 693; *Sandys v. Florence*, 47 L. J. C. P. 598.

¹³⁴ *Mateer v. Brown*, 1 Cal. 221, 52 Am. Dec. 303; *Mason v. Thompson*, 9 Pick. (26 Mass.) 280, 20 Am. Dec. 471; *Lusk v. Belote*, 22 Minn. 468; *Hulett v. Swift*, 33 N. Y. 571, 88 Am. Dec. 405; *Holstein v. Phillips*, 146 N. C. 366, 59 S. E. 1037, 14 L. R. A. (N. S.) 475, 14 Ann. Cas. 323.

¹³⁵ See 1 Rev. Laws Mass. 1902, c. 102, §§ 10, 11; 2 Rev. St. Mo. 1909, §§ 6716, 6717; Pub. St. N. H. 1901, c. 129; Consol. Laws N. Y. c. 20 (General Business Law) §§ 200-203.

¹³⁶ "A common carrier is defined to be one who undertakes for hire to transport the goods of such as choose to employ him from place to place." *Illinois Cent. R. Co. v. Frankenberg*, 54 Ill. 88, 95, 5 Am. Rep. 92; *Dwight v. Brewster*, 1 Pick. (Mass.) 50, 53, 11 Am. Dec. 133.

¹³⁷ *Hale v. New Jersey Steam Nav. Co.*, 15 Conn. 539, 39 Am. Dec.

cused, if he show that loss or damage was due to an act of God,¹³⁸ of public authority,¹³⁹ or of the public enemy,¹⁴⁰ the inherent nature of the goods,¹⁴¹ or the conduct of the ship-

398; *Louisville & N. R. Co. v. Warfield & Lee*, 129 Ga. 473, 29 S. E. 234; *United States Express Co. v. Hutchins*, 67 Ill. 348; *Cincinnati, N. O. & T. P. Ry. Co. v. Rankin*, 153 Ky. 730, 156 S. W. 400, 45 L. R. A. (N. S.) 529; *Klauber v. American Ex. Co.*, 21 Wis. 21, 91 Am. Dec. 452.

¹³⁸ *Blythe v. Denver & R. G. Ry. Co.*, 15 Colo. 333, 25 Pac. 702, 11 L. R. A. 615, 22 Am. St. Rep. 403 (gale of wind); *McC Campbell, Fligg & Burnett v. Louisville & N. R. Co.*, 150 Ky. 723, 150 S. W. 987 (intensely hot weather); *Jones v. Minneapolis & St. L. R. Co.*, 91 Minn. 229, 97 N. W. 893, 103 Am. St. Rep. 507 (blizzard); *Colt v. McMechen*, 6 Johns. (N. Y.) 160, 5 Am. Dec. 200 (sudden failure of wind); *Slater v. South Carolina Ry. Co.*, 29 S. C. 96, 6 S. E. 936 (earthquake). See *Hutchinson on Carriers* (3d Ed.) §§ 269-273. Contra, if the carrier's negligence concurred. *Wald v. Pittsburg, C., C. & St. L. R. Co.*, 162 Ill. 545, 44 N. E. 888, 35 L. R. A. 356, 53 Am. St. Rep. 332; *Green-Wheeler Shoe Co. v. Chicago, R. I. & P. Ry. Co.*, 130 Iowa, 123, 106 N. W. 498, 5 L. R. A. (N. S.) 882, 8 Ann. Cas. 45; *Read v. Spaulding*, 30 N. Y. 630, 86 Am. Dec. 426. "To excuse the carrier the act of God must be the sole and immediate cause of the loss." *Merritt v. Earle*, 29 N. Y. 115, 118, 86 Am. Dec. 292. In accord, *New Brunswick Steamboat & Canal Transp. Co. v. Tiers*, 24 N. J. Law, 698, 64 Am. Dec. 394.

¹³⁹ *Hynds v. Wynn*, 71 Iowa, 593, 33 N. W. 73; *Alabama & V. Ry. Co. v. Tirelli*, 93 Miss. 797, 48 South. 962, 21 L. R. A. (N. S.) 731, 136 Am. St. Rep. 559, 17 Ann. Cas. 879; *New York Cent. & H. R. R. Co. v. Well*, 65 Misc. Rep. 179, 119 N. Y. Supp. 676.

¹⁴⁰ This means the citizens or subjects of a nation with which the country of the carrier is at war and pirates, who are the enemies of all mankind. It does not operate to exempt the carrier, where the goods are lost or injured by mobs, rioters, strikers, thieves, or the like. See *Hutchinson on Carriers* (3d Ed.) vol. 1, §§ 314-318.

¹⁴¹ This includes such causes as natural decay, fermentation, evaporation, leakage, spontaneous combustion; also restiveness, fright, or viciousness of animals. The extent of the carrier's duty here "is to take all reasonable care and use all proper precautions to prevent such injuries or to diminish their effect so far as he can; but his liability in such cases is by no means that of an insurer." *Evans v. Fitchburg R. Co.*, 111 Mass. 142, 144, 15 Am. Rep. 19. In accord, *South & North Ala. R. Co. v. Henlein & Barr*, 52 Ala. 606, 23 Am. Rep. 578; *McCoy v. K. & D. M. R. Co.*, 44 Iowa, 424; *Lewis v. Pennsylvania R. C.*, 70 N. J. Law, 132, 56 Atl. 128, 1 Ann. Cas. 156; *Currie v. Seaboard Air Line Ry. Co.*, 156 N. C. 432, 72 S. E. 493. That the carrier must himself have been free from contributory neg-

per.¹⁴² A carrier of passengers stands in the same position with respect to baggage¹⁴³ intrusted to his possession,¹⁴⁴ but if the passenger retains control the carrier will be liable only if negligence is shown.¹⁴⁵

The measure of care with respect to passengers has been variously stated,¹⁴⁶ e. g., as "extraordinary care,"¹⁴⁷ "the highest practicable degree of care,"¹⁴⁸ "the highest degree

ligence, see *Clarke v. Rochester & S. R. Co.*, 14 N. Y. 570, 67 Am. Dec. 205, note; *McGraw v. Baltimore & O. R. Co.*, 18 W. Va. 361, 41 Am. Rep. 696.

¹⁴² *Loveland v. Burke*, 120 Mass. 139, 21 Am. Rep. 507; *Bradley v. Lake Shore & M. S. Ry. Co.*, 145 App. Div. 312, 129 N. Y. Supp. 1045; *American Lead Pencil Co. v. Nashville, C. & St. L. Ry.*, 124 Tenn. 57, 134 S. W. 613, 32 L. R. A. (N. S.) 323. Whether the act of the shipper by which the injury was caused amounted to negligence is immaterial. *Hart v. Chicago & N. W. Ry. Co.*, 69 Iowa, 485, 29 N. W. 597.

¹⁴³ Baggage includes "whatever the passenger takes with him for his personal use or convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purpose of the journey." *Macrow v. Great Western Ry. Co.*, L. R. 6 Q. B. 612, 622, per Cockburn, C. J. In accord, *Chicago, R. I. & P. Ry. Co. v. Whitten*, 90 Ark. 462, 119 S. W. 835, 21 Ann. Cas. 726; *Kansas City, Ft. S. & G. R. Co. v. Morrison*, 34 Kan. 502, 9 Pac. 225, 55 Am. Rep. 252; *Hasbrouck v. New York Cent. & H. R. R. Co.*, 202 N. Y. 363, 95 N. E. 808, 35 L. R. A. (N. S.) 537, Ann. Cas. 1912D, 1150; *New York Cent. & H. R. R. Co. v. Fraloff*, 100 U. S. 24, 25 L. Ed. 531.

¹⁴⁴ *Haaga v. Austro-Americana Line*, 173 Ill. App. 35; *Wolf v. Grand Rapids Holland & Chicago Ry.*, 149 Mich. 75, 112 N. W. 732; *Hubbard v. Mobile & Ohio Ry. Co.*, 112 Mo. App. 459, 87 S. W. 52; *Merrill v. Grinnell*, 30 N. Y. 594; *Chesapeake & Ohio Ry. Co. v. Beasley*, 104 Va. 788, 52 S. E. 566, 3 L. R. A. (N. S.) 183.

¹⁴⁵ *Repp v. Indianapolis O. & S. T. Co.* (Ind. App. 1905) 109 N. E. 441; *Kinsley v. Lake Shore & M. S. R. Co.*, 125 Mass. 54, 28 Am. Rep. 200, note; *Knieriem v. New York Cent. & H. R. R. Co.*, 109 App. Div. 709, 96 N. Y. Supp. 602; *American Steamship Co. v. Bryan*, 83 Pa. 446. Cf. *Adams v. New Jersey Steamboat Co.*, 151 N. Y. 163, 45 N. E. 369, 34 L. R. A. 682, 56 Am. St. Rep. 616, where a steamboat was treated as a "floating inn."

¹⁴⁶ See *Moore on Carriers* (2d Ed.) vol. 2, p. 1210 et seq.

¹⁴⁷ *Raymond v. Burlington, O. R. & N. Ry. Co.*, 65 Iowa, 152, 154, 21 N. W. 495; *Sales v. Western Stage Co.*, 4 Iowa, 547, 549.

¹⁴⁸ *Washington, A. & Mt. V. Ry. Co. v. Vaughan*, 111 Va. 785, 794, 69 S. E. 1035.

of care that a reasonable man would use,"¹⁴⁹ "the highest degree of care of a very prudent person,"¹⁵⁰ "the highest degree of care and caution, consistent with the practical operation of the road,"¹⁵¹ "the utmost caution characteristic of very careful prudent men,"¹⁵² or "the utmost care and diligence which human foresight can use."¹⁵³

No useful purpose would be served by attempting here to analyze these statements of a principle which in effect is that the degree of care for the safety of passengers "is much higher than the ordinary care required of men who sustain to each other nothing more than the common relations of life which one citizen, merely as such, sustains to another."¹⁵⁴ This does not apply, however, where the person of the passenger is not in the carrier's control. "In the approaches to the cars, such as platforms, halls, stairways, and the like, a less degree of care is required. * * * The rule in such cases is that the carrier is bound simply to exercise ordinary care in view of the dangers to be apprehended."¹⁵⁵ "With respect of these it is to be

¹⁴⁹ *Kebbe v. Connecticut Co.*, 85 Conn. 641, 643, 84 Atl. 329, Ann. Cas. 1913C, 167. Cf. *Chesapeake & O. Ry. Co. v. Burke*, 147 Ky. 694, 696, 145 S. W. 370, Ann. Cas. 1913D, 208 ("highest degree of care which ordinarily prudent persons engaged in the operation of railroad trains exercise for the safety of passengers").

¹⁵⁰ *O'Connell v. St. Louis Cable & W. Ry. Co.*, 106 Mo. 482, 484, 17 S. W. 494. Cf. *Beattie v. Detroit United Ry.*, 158 Mich. 243, 246, 122 N. W. 557.

¹⁵¹ *West Chicago St. R. Co. v. Kromshinsky*, 185 Ill. 92, 56 N. E. 1110.

¹⁵² *Pennsylvania Co. v. Roy*, 102 U. S. 451, 456, 26 L. Ed. 141. Cf. *Brady v. Springfield Traction Co.*, 140 Mo. App. 421, 425, 124 S. W. 1070 ("utmost care * * * that would be used by very cautious persons under the same circumstances").

¹⁵³ *Philadelphia, B. & W. R. Co. v. Allen*, 102 Md. 110, 113, 62 Atl. 245; Cf. *Palmer v. President, etc., of Delaware & H. Canal Co.*, 120 N. Y. 170, 174, 24 N. E. 302, 17 Am. St. Rep. 629; *Fredericks v. Northern Cent. R. Co.*, 157 Pa. 103, 27 Atl. 689, 22 L. R. A. 306; *Ozanne v. Illinois Cent. R. Co. (C. C.)* 151 Fed. 900.

¹⁵⁴ *Michie on Carriers*, vol. 2, p. 1714.

¹⁵⁵ *Kelly v. Manhattan Ry. Co.*, 112 N. Y. 443, 450, 20 N. E. 383, 3 L. R. A. 74. In accord, *Falls v. San Francisco & N. P. R. Co.*, 97 Cal. 114, 31 Pac. 901; *Bacon v. Casco Bay Steamboat Co.*, 90 Me. 46, 37 Atl. 328.

held to that reasonable degree of care for the safety and protection of its patrons, having regard to the nature of its business, as is demanded of individuals upon whose premises others come by invitation or inducement for the transaction of business.”¹⁵⁶

DETERMINING STANDARD OF CARE—RES IPSA LOQUITUR

111. What the conduct of the man of ordinary prudence would have been under the circumstances, and whether plaintiff or defendant lived up to this standard, are questions which ordinarily must be answered by the jury, unless the facts are undisputed, and fair-minded men could draw but one conclusion from them.¹⁵⁷

But there are cases where a definite rule of law has been framed to meet given conditions. For example, it may be said generally, the courts not being altogether in accord in formulating the rule, that a traveler who goes upon a railway track must first “make a vigilant use of his eyes and ears to ascertain the presence of a train.”¹⁵⁸ He must look and listen, and a failure to do so will constitute negligence,¹⁵⁹ though his omission to look will not necessarily

¹⁵⁶ *Pennsylvania Co. v. Marion*, 104 Ind. 239, 243, 3 N. E. 874, per Mitchell, J. In accord, *Atchison, T. & S. F. R. Co. v. Allen*, 75 Kan. 190, 88 Pac. 966, 10 L. R. A. (N. S.) 576. Cf. *Bennett v. Louisville & N. R. Co.*, 102 U. S. 577, 26 L. Ed. 235.

¹⁵⁷ *Mann v. Belt Railroad & Stock-Yard Co.*, 128 Ind. 138, 26 N. E. 819; *Lasky v. Canadian Pacific Ry. Co.*, 83 Me. 461, 22 Atl. 367; *Cumberland & P. R. Co. v. State to Use of Fazenbaker*, 37 Md. 156; *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485.

¹⁵⁸ *Judson v. Central Vt. R. Co.*, 158 N. Y. 597, 605, 53 N. E. 514; *Davis v. New York Cent. & H. R. R. Co.*, 47 N. Y. 400.

¹⁵⁹ *Louisville & N. R. Co. v. Richards*, 100 Ala. 365, 13 South. 944; *Lake Shore & M. S. R. Co. v. Miller*, 25 Mich. 274; *Cooper v. North Carolina R. Co.*, 140 N. C. 209, 52 S. E. 932, 3 L. R. A. (N. S.) 391, 6 Ann. Cas. 71; *Norfolk & W. R. Co. v. Wilson*, 90 Va. 263, 18 S. E. 35; *Chicago, R. I. & P. R. Co. v. Houston*, 95 U. S. 697, 24 L. Ed. 542;

make him negligent, where to look would be useless.¹⁶⁰ By the weight of authority there is no rule of law that requires him to stop, though his failure to do so may be a fact to be considered by the jury.¹⁶¹ There is also, as many courts have held, a legal duty to look before crossing a city street.¹⁶² But, although the traveler must use his eyes, yet

Hart v. Northern Pac. Ry. Co., 196 Fed. 180, 116 C. C. A. 12. In Illinois, however, it has been held that "no invariable rule can be predicated upon the mere act of failing to look or listen." *Terre Haute & I. R. Co. v. Voelker*, 129 Ill. 540, 553, 22 N. E. 20. The authorities are collected in 37 L. R. A. (N. S.) 135, note.

¹⁶⁰ *Vance v. Atchison, T. & S. F. Ry. Co.*, 9 Cal. App. 20, 98 Pac. 41 (view obstructed by box car); *Smedis v. Brooklyn & R. B. R. Co.*, 88 N. Y. 13 (engine without lights on dark night; could not have been heard); *Pruey v. New York Cent. & H. R. R. Co.*, 41 App. Div. 158, 58 N. Y. Supp. 797, affirmed 166 N. Y. 616, 59 N. E. 1129 (engine backing without light or signal on dark, foggy morning); *Norfolk & W. R. Co. v. Burge*, 84 Va. 63, 4 S. E. 21 (view of track obstructed by fence and buildings). Cf. *Hendrickson v. Great Northern Ry. Co.*, 52 Minn. 340, 54 N. W. 189; *Cleveland, O. & C. R. Co. v. Crawford*, 24 Ohio St. 631, 15 Am. Rep. 633. Contra, if the obstruction is but temporary (e. g., smoke from a passing engine), *Debbins v. Old Colony R. Co.*, 154 Mass. 402, 28 N. E. 274; *West Jersey R. Co. v. Ewan*, 55 N. J. Law, 574, 27 Atl. 1064; *Heaney v. Long Island R. Co.*, 112 N. Y. 122, 19 N. E. 422.

¹⁶¹ *Illinois Cent. R. Co. v. Mizell*, 100 Ky. 235, 38 S. W. 5; *Van Auken v. Chicago & W. M. Ry. Co.*, 96 Mich. 307, 55 N. W. 971, 22 L. R. A. 33; *Jenkins v. Minneapolis & St. L. R. Co.*, 124 Minn. 368, 145 N. W. 40; *Danskin v. Pennsylvania R. Co.*, 83 N. J. Law, 522, 83 Atl. 1006; *Judson v. Central Vt. R. Co.*, 158 N. Y. 597, 53 N. E. 514. But in Pennsylvania it has been held that the traveler must stop, and, if he cannot see the track, he must alight from his vehicle and advance to a point from which an observation may be made. *Pennsylvania R. Co. v. Beale*, 73 Pa. 504, 13 Am. Rep. 753; *Mankewicz v. Lehigh Valley R. Co.*, 214 Pa. 386, 63 Atl. 604; *Bistider v. Lehigh Valley R. Co.*, 224 Pa. 615, 73 Atl. 940. Cf. *Ellis v. Lake Shore & M. S. R. Co.*, 138 Pa. 506, 21 Atl. 140, 21 Am. St. Rep. 914. The duty of an automobile driver to stop where there is restricted vision has been held a positive duty. *Brommer v. Pennsylvania R. Co.*, 179 Fed. 577, 103 C. C. A. 135, 29 L. R. A. (N. S.) 924; *New York Cent. & H. R. R. Co. v. Maidment*, 168 Fed. 21, 93 C. C. A. 413, 21 L. R. A. (N. S.) 794.

¹⁶² *Davis v. John Breuner Co.*, 167 Cal. 683, 140 Pac. 586; *Zoltovski v. Gzella*, 159 Mich. 620, 124 N. W. 527, 26 L. R. A. (N. S.) 435, 134 Am. St. Rep. 752; *Lorah v. Rinehart*, 243 Pa. 231, 89 Atl. 967 (look and listen); *Dimuria v. Seattle Transfer Co.*, 50 Wash. 633, 97

as the New York Court of Appeals has said in a recent case: "The law does not say how often he must look, or precisely how far, or when, or from where. If, for example, he looks as he starts to cross, and the way seems clear, he is not bound as a matter of law to look again. The law does not even say that, because he sees a wagon approaching, he must stop till it has passed. He may go forward unless it is close upon him; and whether he is negligent in going forward will be a question for the jury. If he has used his eyes, and has miscalculated the danger, he may still be free from fault. But it is a very different thing to say that he is not bound to look at all."¹⁶³

It has been seen that a cause of action may arise out of the breach of a statutory duty.¹⁶⁴ This is not to be confounded with cases based upon negligence. In the former, the failure to observe the statute creates a liability *per se*. In the latter, the violation of a statute or an ordinance having some connection with the injury is, as some courts have held, merely evidence more or less cogent to be considered by the jury.¹⁶⁵ Thus, in New York, where this doctrine prevails, it was held that the violation of a statute prohibiting the employment of a child under fourteen in any factory was to be given mere evidential effect in an action brought by one injured thereby.¹⁶⁶ A similar conclusion was reached where a team was left unattended in the street,¹⁶⁷ and where a public way was obstructed,¹⁶⁸ in disregard of an ordinance.¹⁶⁹ The

Pac. 657, 22 L. R. A. (N. S.) 471. Contra, *Barbour v. Shebor* (1912) 177 Ala. 304, 58 South. 276. See *Williams v. Grealy*, 112 Mass. 79 (cf. *Crimmins v. Armstrong Transfer Exp. Co.*, 217 Mass. 155, 104 N. E. 457).

¹⁶³ *Knapp v. Barrett*, 216 N. Y. 226, 230, 110 N. E. 428, per Cardozo, J. Cf. *Higgins v. Public Service Ry. Co.* (1910) 79 N. J. Law, 471, 76 Atl. 1028.

¹⁶⁴ See *supra*, p. 32 et seq.

¹⁶⁵ *Amberg v. Kinley*, 214 N. Y. 531, 108 N. E. 830, L. R. A. 1915E, 519.

¹⁶⁶ *Marino v. Lehmaier*, 173 N. Y. 530, 66 N. E. 572, 61 L. R. A. 811.

¹⁶⁷ *Knupfle v. Knickerbocker Ice Co.*, 84 N. Y. 488.

¹⁶⁸ *Fluker v. Ziegele Brewing Co.*, 201 N. Y. 40, 93 N. E. 1112, Ann. Cas. 1912A, 793.

¹⁶⁹ In accord, *Foote v. American Product Co.*, 195 Pa. 190, 45 Atl.

effect of such decisions would seem decidedly unfortunate, and the doctrine has been strongly criticized.¹⁷⁰ On the other hand, it has been held that the violation of a statute or ordinance is negligence *per se*,¹⁷¹ though some courts draw a distinction, refusing to apply this rule to the ordinance.¹⁷²

It is submitted that the true principle is to be found midway between these opposing doctrines, and is that failure to comply with such a statute or ordinance is to be deemed *prima facie* evidence of negligence,¹⁷³ and in the absence of circumstances showing a proper excuse should be regarded as conclusive,¹⁷⁴ assuming, of course, that such failure is a cause of the injury.

934, 49 L. R. A. 764, 78 Am. St. Rep. 806 (ordinance requiring vehicles to keep to the right). But the foregoing rule is limited to cases in which the ordinance relates to the alleged negligent act under investigation. *Ubelmann v. American Ice Co.*, 209 Pa. 398, 58 Atl. 849.

¹⁷⁰ "It seems to have escaped the attention of the judges who have laid down this rule that it has the effect of clothing common juries with the *dispensing power*—the power to set aside acts of the Legislature, * * *" which thus sink "below the grade of by-laws of corporations, for although the latter can be set aside and disregarded in judicial administration, when deemed unreasonable, yet it is always for the judge, and never for the jury, to decide whether or not they are unreasonable." *Thompson on Negligence*, vol. 1, § 11.

¹⁷¹ As where the speed limit is exceeded (*Central Railroad & Banking Co. v. Smith*, 78 Ga. 694, 3 S. E. 397; *Fox v. Barekman*, 178 Ind. 572, 99 N. E. 989; *Westover v. Grand Rapids Ry. Co.*, 180 Mich. 373, 147 N. W. 630), a child under the statutory age employed (*Beaver v. Mason, Ehrman & Co.* [1914] 73 Or. 36, 143 Pac. 1000), a crossing obstructed (*Lindler v. Southern Ry.*, 84 S. C. 536, 66 S. E. 995), a vehicle passed on the wrong side (*Hamilton, Harris & Co. v. Larrimer* [1914] 183 Ind. 429, 105 N. E. 43), a street car not equipped with the required fender (*Rudolph v. Portland Ry., Light & Power Co.*, 72 Or. 560, 144 Pac. 93), or a firearm discharged within town limits (*Farrow v. Hoffecker*, 7 Pennewill [23 Del.] 223, 79 Atl. 920).

¹⁷² *Westover v. Grand Rapids Ry. Co.*, 180 Mich. 373, 147 N. W. 630.

¹⁷³ See *Southwestern Telegraph & Telephone Co. v. Myane*, 86 Ark. 548, 111 S. W. 987; *Commonwealth Electric Co. v. Rose*, 214 Ill. 545, 73 N. E. 780 (cf. *Hartnett v. Boston Store of Chicago*, 265 Ill. 331, 106 N. E. 837, L. R. A. 1915C, 460).

¹⁷⁴ See *Jones v. Co-operative Ass'n of America*, 109 Me. 448, 84 Atl. 985, L. R. A. 1915E, 745. "It seems to us that the true rule is,

Res Ipsa Loquitur

He who asserts must prove. Hence the burden rests continuously upon plaintiff to establish defendant's want of due care. If, at the conclusion of the case, the scales are evenly balanced in the opinion of the jury, and necessarily if the scale of defendant weighs down, then plaintiff loses. In certain cases, however, he may find it very difficult, if not impossible, to prove specifically and in what respect there had been a failure to exercise proper care, and it may be that here he can invoke the doctrine that "the thing itself speaks." This means that the circumstances attendant upon the injury are of such a character as to justify a jury in inferring negligence as to the cause.¹⁷⁵ It is sometimes spoken of as a presumption, but this is not quite correct. Nor is the burden which plaintiff has undertaken to bear removed from his shoulders. The jury are not required to find negligence. They are merely permitted to do so. A nonsuit is prevented.¹⁷⁶ What shape the doctrine will finally assume can hardly be predicted. "But," says Professor Wigmore,¹⁷⁷ "the following considerations ought to limit it: (1) The apparatus must be such that in the ordinary instance no injurious operation is to be expected, unless from a careless construction, inspection, or user. (2) Both inspection and user must have been at the time of the injury in the control of the party charged.

in all such cases, that the violation of such a statute or ordinance should always be deemed presumptive evidence of negligence which, if not excused by other evidence, including all the surrounding circumstances, should be deemed conclusive. But if it appears upon the whole evidence that the circumstances were such as would convince a prudent man that the real object which the legislators had in view would be much better served by the breach of a technical rule than by its strict observance, the defendant should not be held guilty of negligence in such a breach." Shearman & Redfield on Negligence (6th Ed.) vol. 1, p. 26.

¹⁷⁵ City of Atlanta v. Stewart & Ray, 117 Ga. 144, 43 S. E. 443.

¹⁷⁶ For full discussion of the doctrine, see HUGHES v. ATLANTIC CITY & S. R. CO., 85 N. J. Law, 212, 89 Atl. 769, L. R. A. 1916A, 927, Chapin Cas. Torts, 342; Turner v. Southern Power Co., 154 N. C. 131, 69 S. E. 767, 32 L. R. A. (N. S.) 848.

¹⁷⁷ Wigmore on Evidence, vol. 4, § 2509.

(3) The injurious occurrence or condition must have happened, irrespective of any voluntary action at the time by the party injured." The cases in which this doctrine is applied are those in which the injury would not have occurred unless, according to the ordinary experience of mankind, there had been a want of due care on defendant's part.¹⁷⁸ It is perhaps chiefly illustrated in actions against carriers for injuries received by passengers.¹⁷⁹ But the injury must have resulted "from the breaking of machinery, collision, derailment of cars, or something improper or unsafe in the conduct of the business or in the appliances of transportation."¹⁸⁰ Thus there will be no inference of negligence where a missile is thrown through the window of a car.¹⁸¹ In another line of cases the principle has been applied where materials or structures have fallen upon parties in public places.¹⁸² Further illustrations are given in the note.¹⁸³

¹⁷⁸ *Howser v. Cumberland & P. R. Co.*, 80 Md. 146, 30 Atl. 906, 27 L. R. A. 154, 45 Am. St. Rep. 332; *O'Neill v. Toomey*, 218 Mass. 242, 105 N. E. 974; *Lyttle v. Denny*, 222 Pa. 395, 71 Atl. 841, 20 L. R. A. (N. S.) 1027, 128 Am. St. Rep. 814, 15 Ann. Cas. 924; *Houston v. Brush & Curtis*, 66 Vt. 331, 29 Atl. 380; *Scott v. London & St. Katherine Docks Co.*, 13 L. T. Rep. N. S. 148.

¹⁷⁹ *Paducah Traction Co. v. Baker*, 130 Ky. 360, 113 S. W. 449, 18 L. R. A. (N. S.) 1185; *Minihan v. Boston Elevated Ry. Co.*, 197 Mass. 367, 83 N. E. 871; *HUGHES v. ATLANTIC CITY & S. R. CO.*, 85 N. J. Law, 212, 89 Atl. 769, L. R. A. 1916A, 927, Chapin Cas. Torts, 342; *Breen v. New York Cent. & H. R. R. Co.*, 109 N. Y. 297, 16 N. E. 60, 4 Am. St. Rep. 450. See 13 L. R. A. (N. S.) 601, note.

¹⁸⁰ *Thomas v. Philadelphia & R. R. Co.*, 148 Pa. 180, 23 Atl. 989, 15 L. R. A. 416.

¹⁸¹ *Thomas v. Philadelphia & R. R. Co.*, supra. In accord, *Spencer v. Chicago, M. & St. P. Ry. Co.* (1900) 105 Wis. 311, 81 N. W. 407.

¹⁸² *Gallagher v. Edison Illuminating Co.*, 72 Mo. App. 576; *Hogan v. Manhattan Ry. Co.*, 149 N. Y. 23, 43 N. E. 403; *Kraljer v. Snare & Triest Co.*, 221 Fed. 255, 137 C. C. A. 108; *Kearney v. London B. & S. C. Ry. Co.*, 40 L. J. Q. B. N. S. 285; *Scott v. London & St. Katherine Docks Co.*, 13 L. T. Rep. N. S. 148.

¹⁸³ *Judson v. Giant Powder Co.*, 107 Cal. 549, 40 Pac. 1020, 29 L. R. A. 718, 48 Am. St. Rep. 146 (explosion in powder factory); *Gould v. Winona Gas Co.*, 100 Minn. 258, 111 N. W. 254, 10 L. R. A. (N. S.) 889 (escape of gas from street main); *GRIFFEN v. MANICE*, 166 N. Y. 188, 59 N. E. 925, 52 L. R. A. 922, 82 Am. St. Rep. 630,

The maxim cannot be invoked where the cause of the injury is unknown. It "does not go to the extent of implying that you may from the mere fact of an injury infer what physical act produced that injury; but it means that when the physical act has been shown, or is apparent, and is not explained by the defendant, the conclusion that negligence superinduced it may be drawn as a legitimate deduction of fact. It permits an inference that the known act which produced the injury was a negligent act, but it does not permit an inference as to what act did produce the injury. Negligence manifestly cannot be predicated of any act until you know what the act is. Until you know *what* did occasion an injury, you cannot say that the defendant was guilty of some negligence that produced that injury. There is, therefore, a difference between inferring as a conclusion of fact *what* it was that did the injury, and inferring from a known or proven act occasioning the injury that there was negligence in the act that did produce the injury. To the first category the maxim *res ipsa loquitur* has no application; it is confined, when applicable at all, solely to the second."¹⁸⁴ Hence it was not applied where a passenger on the car of a switchback railway was found lying on the track in a tunnel, it not appearing how or why he had fallen.¹⁸⁵ So, "where the injury might well have resulted from any one of many causes, the plaintiff by a fair preponderance of evidence must exclude the operation of those causes for which the defendant is under no legal obligation."¹⁸⁶ Again, even though the cause of the injury is known, the doctrine cannot be invoked, unless "the occurrence as proved points necessarily to negligence of

Chapin Cas. Torts, 336 (fall of elevator); *May v. Charleston Interurban R. Co.* (1915) 75 W. Va. 797, 84 S. E. 893 (street railway rail charged with electricity); *Carroll v. Chicago, B. & N. R. Co.*, 99 Wis. 399, 75 N. W. 176, 67 Am. St. Rep. 872 (falling window).

¹⁸⁴ *Benedick v. Potts*, 88 Md. 52, 56, 40 Atl. 1067, 41 L. R. A. 478.

¹⁸⁵ *Benedick v. Potts*, *supra*. In accord, *Bahr v. Lombard, Ayres & Co.*, 53 N. J. Law, 233, 21 Atl. 190, 23 Atl. 167; *Eaton v. New York Cent. & H. R. R. Co.*, 195 N. Y. 267, 88 N. E. 378.

¹⁸⁶ *Trim v. Fore River Ship Building Co.*, 211 Mass. 593, 595, 98 N. E. 591, per De Courcey, J.; *Prest-O-Lite Co. v. Skeel*, 182 Ind. 593, 599, 106 N. E. 365.

some kind on the part of the defendant.”¹⁸⁷ As already stated, the case must be one where the injury could not have happened without negligence according to the ordinary experience of mankind. The doctrine merely excuses lack of precision in the proof.¹⁸⁸ Thus, where a passenger was injured at a crossing, by a collision between cars belonging to different carriers and on different roads, the doctrine of *res ipsa loquitur* would apply only to the carrier of the passenger, and not to the other line, since as to the latter “it cannot be said that in the ordinary course of things a car does not collide with vehicles or persons, except when there has been carelessness in the management of the car.”¹⁸⁹

DAMAGE

112. It is the occurrence of damage that perfects the cause of action for negligence,¹⁹⁰ and the damage must proximately follow.

If plaintiff's want of care has contributed in producing the entire result, then, as will be seen, there can be no recovery at all. But though he may not have been negligent at first, and hence may be in a position to recover to some extent, he may yet have failed to use reasonable care to minimize the harmful results. Here he cannot hold the defendant responsible for the additional damage which he might thus have avoided. For example, if after having received personal injuries he omit to consult a physician, or to act upon his advice, he cannot then expect to recover for the aggravation due to a failure to take precautions which a reasonable man would have taken.¹⁹¹ Reasonable care is

¹⁸⁷ *Stelter v. Cordes*, 146 App. Div. 300, 130 N. Y. Supp. 688.

¹⁸⁸ *Davis v. Crisham*, 213 Mass. 151, 99 N. E. 959; *Robinson v. Consolidated Gas Co. of New York*, 194 N. Y. 37, 86 N. E. 805, 28 L. R. A. (N. S.) 586; *De Glopper v. Nashville Ry. & Light Co.*, 123 Tenn. 633, 134 S. W. 609, 33 L. R. A. (N. S.) 913; *Christensen v. Oregon Short Line R. Co.* (1909) 35 Utah, 137, 99 Pac. 676, 20 L. R. A. (N. S.) 255, 18 Ann. Cas. 1159.

¹⁸⁹ *Loudoun v. Eighth Ave. R. Co.*, 162 N. Y. 380, 386, 56 N. E. 988.

¹⁹⁰ See *supra*, p. 74.

¹⁹¹ *Donovan v. New Orleans Ry. & Light Co.*, 132 La. 239, 61 South.

all that is required, and hence plaintiff is not bound to undergo a serious and critical operation, which would necessarily be attended with some risk of failure,¹⁹² nor, if he has acted in good faith and exercised reasonable care in the selection of a physician, will he be held responsible for the consequences of unskillful treatment.¹⁹³ "The jury, in getting at the damages, are to say, not only what they are, but whether the means used by the plaintiff to reduce the damages were such as an ordinarily prudent man would use. They cannot say that he should or should not have taken the advice of any particular physician, nor that he should have obtained any particular kind of treatment. As to that he must himself be the judge. But when he has determined what treatment to take, it will be for the jury to say if, in making that determination, he used the means that a reasonably prudent man would take to cure himself of the injury. If he did, he is entitled to recover for his damages as they are presented to the jury. If he did not, and the jury can say that some other treatment would have brought about a cure, and that treatment was one that a reasonably prudent man would have submitted to, then they must say that he has not used the care which a reasonably prudent man would use to reduce the damages, and must take that into consideration in reaching their ver-

216, 48 L. R. A. (N. S.) 109; *United Rys. & Electric Co. v. Dean*, 117 Md. 686, 84 Atl. 75; *Zibbell v. Grand Rapids*, 129 Mich. 659, 89 N. W. 563; *Leltzell v. Delaware, L. & W. R. Co.*, 232 Pa. 475, 81 Atl. 543, 48 L. R. A. (N. S.) 114. Authorities are collected in 48 L. R. A. (N. S.) 110, note. And see *supra*, p. 88.

¹⁹² *Kehoe v. Allentown & L. V. Traction Co.*, 187 Pa. 474, 41 Atl. 310; *Martin v. Pittsburgh Rys. Co.*, 238 Pa. 528, 86 Atl. 299, 48 L. R. A. (N. S.) 115. In accord, *BLATE v. THIRD AVE. R. CO.*, 44 App. Div. 163, 60 N. Y. Supp. 732, *Chapin Cas. Torts*, 346. Cf. *Sullivan v. Tloga R. Co.*, 112 N. Y. 643, 20 N. E. 569, 8 Am. St. Rep. 793. As to minor operation, see *White v. Chicago & N. W. Ry. Co.*, 145 Iowa, 408, 124 N. W. 309.

¹⁹³ *Variety Mfg. Co. v. Landaker*, 227 Ill. 22, 81 N. E. 47; *Clark v. Heath*, 101 Me. 530, 64 Atl. 913, 8 L. R. A. (N. S.) 144; *Sauter v. New York Cent. & H. R. R. Co.*, 66 N. Y. 50, 23 Am. Rep. 18; *Lyons v. Erie Ry. Co.*, 57 N. Y. 489; *Wallace v. Pennsylvania R. Co.*, 222 Pa. 556, 71 Atl. 1086, 128 Am. St. Rep. 817; *Selleck v. City of Janesville*, 100 Wis. 157, 75 N. W. 975, 41 L. R. A. 563, 69 Am. St. Rep. 906.

dict.”¹⁹⁴ Cases cited in the note afford further illustration of the principle which requires the injured party to act with reasonable diligence to lessen the damage, or, more accurately, to prevent its occurrence.¹⁹⁵ For further injury suffered while so acting, the wrongdoer should be held responsible.¹⁹⁶

CONTRIBUTORY NEGLIGENCE

113. One cannot be permitted to profit by his own wrong. Hence, if plaintiff's negligence has concurred with that of defendant in producing the damage, there can be no recovery.

Though plaintiff's negligence must have been a proximate cause of the harm in order to bar his recovery,¹⁹⁷ it is not essential that it be the sole cause. It is enough that it concur with other causes. It makes no difference that the damage has been caused chiefly by defendant's want of care. “The law will not weigh or apportion the concurring negligence of a plaintiff and defendant.”¹⁹⁸ The

¹⁹⁴ *BLATE v. THIRD AVE. R. CO.*, 44 App. Div. 163, 167, 60 N. Y. Supp. 732, Chapin Cas. Torts, 346, per Rumsey, J.

¹⁹⁵ *Ft. Smith Suburban Ry. Co. v. Maledon*, 78 Ark. 366, 95 S. W. 472; *Tally v. Courter*, 93 Mich. 473, 53 N. W. 621; *Gniabck v. Northwestern Improvement & Boom Co.*, 73 Minn. 87, 75 N. W. 894; *Vencill v. Quincy, O. & K. C. R. Co.*, 132 Mo. App. 722, 112 S. W. 1030; *Watkins v. Rist*, 67 Vt. 284, 31 Atl. 413. And see *supra*, p. 87.

¹⁹⁶ See *Rexter v. Starin*, 73 N. Y. 601.

¹⁹⁷ “It must be a proximate cause in the same sense in which the defendant's negligence must have been a proximate cause in order to give a right of action.” *Rider v. Syracuse Rapid Transit Ry. Co.*, 171 N. Y. 139, 147, 63 N. E. 836, 58 L. R. A. 125. In accord, *Pennsylvania R. Co. v. Righter*, 42 N. J. Law, 180; *Boyce v. Wilbur Lumber Co.*, 119 Wis. 642, 97 N. W. 563.

¹⁹⁸ *TEMPLETON'S ADM'R v. LYNCHBURG TRACTION & LIGHT CO.*, 110 Va. 853, 854, 67 S. E. 351, Chapin Cas. Torts, 349. In accord, *Marble v. Ross*, 124 Mass. 44; *Richardson v. St. Louis & H. Ry. Co.*, 223 Mo. 325, 123 S. W. 22; *Weir v. Haverford Electric Light Co.*, 221 Pa. 611, 70 Atl. 874; *Memphis Consol. Gas & Electric Co. v. Simpson* (1907) 118 Tenn. 532, 109 S. W. 1155.

former cannot recover, though his negligence contribute in the least degree, and it is error to instruct the jury that it must contribute in a "material" degree.¹⁹⁹ In some states, however, the principle of "comparative negligence" has to a certain extent been adopted by statute,²⁰⁰ and generally under Workmen's Compensation Laws the wrongdoing of the injured employé which will prevent recovery is restricted to willful misconduct and intoxication.²⁰¹ Another exception is found in admiralty. Where both parties have been negligent, the maritime law apportions the damage "by what has been called *rusticum judicium*."²⁰²

Naturally, before the defense of contributory negligence can successfully be invoked, it must be shown that the plaintiff was under a duty to exercise care towards defend-

¹⁹⁹ Artz v. Chicago, R. I. & P. R. Co., 38 Iowa, 293; Mattimore v. City of Erie, 144 Pa. 14, 22 Atl. 817; La Flam v. Missiquoi Pulp Co., 74 Vt. 125, 52 Atl. 526. It was at one time held in Illinois that "in proportion to the negligence of the defendant should be measured the degree of care required of the plaintiff; that is to say, the more gross the negligence manifested by the defendant, the less degree of care will be required of the plaintiff to entitle him to recover." Galena & C. U. R. Co. v. Jacobs, 20 Ill. 478, 496. But this doctrine of comparative negligence has since been repudiated in that state. City of Lanark v. Dougherty, 153 Ill. 163, 38 N. E. 892; City of Macon v. Holcomb, 205 Ill. 643, 69 N. E. 79.

²⁰⁰ E. g., Florida (Comp. Laws 1914, §§ 3149, 3150D), Georgia (Park's Ann. Civ. Code 1914, §§ 2781, 4426), Mississippi (Laws 1910, c. 135), and Wisconsin (St. 1911, § 1816).

²⁰¹ See statutes collected in Bradbury's Workmen's Compensation and State Insurance Law.

²⁰² Ralli v. Troop, 157 U. S. 386, 406, 15 Sup. Ct. 657, 39 L. Ed. 742. The rule is applicable, not only to cases of collision, but to all cases of marine tort founded upon negligence. THE MAX MORRIS, 137 U. S. 1, 11 Sup. Ct. 29, 34 L. Ed. 586, Chapin Cas. Torts, 350. In The North Star, 106 U. S. 17, 1 Sup. Ct. 41, 27 L. Ed. 91, it was held that the entire damage was to be divided equally, and in Ralli v. Troop, supra, this was said to be the rule. In THE MAX MORRIS, supra, the court declined to express an opinion. See William Johnson & Co. v. Johansen, 86 Fed. 886, 30 C. C. A. 675. In The Eugene F. Moran, 212 U. S. 466, 29 Sup. Ct. 339, 53 L. Ed. 600, where four vessels were in fault, liability was equally apportioned, though more than one of the vessels was owned by one person. See "Collisions at Sea where Both Ships are in Fault," by Leslie F. Scott, 13 Law Quarterly Review, 17.

ant. For instance, one is generally held to owe no obligation to refrain from allowing combustible materials to be on his own property in such proximity to a railroad track that ignition might be caused by sparks from a passing locomotive, such use of the land being otherwise unobjectionable. Hence recovery has been allowed where the occupant had so placed a quantity of flax straw,²⁰³ a frame building,²⁰⁴ or even a kettle of benzine,²⁰⁵ or permitted dry leaves, grass, and stubble to accumulate.²⁰⁶ Although the courts are not fully in accord, it seems better to say that one is not required to anticipate the negligence of another.²⁰⁷ But a duty will arise after knowledge has been acquired that the negligence has become effective, e. g., where the landowner or occupant has learned of the starting of the fire, it being then incumbent upon him to exercise reasonable care to protect his property.²⁰⁸

The "Last Clear Chance"

In the celebrated case of *Davies v. Mann*²⁰⁹ it appeared that plaintiff had fettered the fore feet of his donkey and turned it into the public highway to graze. Defendant's servant, driving at a "smartish pace," ran into the donkey. Plaintiff was allowed to recover, since defendant's servant might by proper care have avoided killing the animal.²¹⁰ Under this doctrine,

²⁰³ *Le Roy Fibre Co. v. Chicago, M. & St. P. Ry. Co.*, 232 U. S. 340, 34 Sup. Ct. 415, 58 L. Ed. 631.

²⁰⁴ *Cook v. Champlain Transp. Co.*, 1 Denio (N. Y.) 91.

²⁰⁵ *Kalbfleisch v. Long Island R. Co.*, 102 N. Y. 520, 7 N. E. 557, 55 Am. Rep. 832 (plaintiff's premises were used as a varnish factory).

²⁰⁶ *Delaware, L. & W. R. Co. v. Salmon*, 39 N. J. Law, 299, 23 Am. Rep. 214; *Kellogg v. Chicago & N. W. Ry. Co.*, 26 Wis. 223, 7 Am. Rep. 69; *Erd v. Chicago & N. W. Ry. Co.*, 41 Wis. 65.

²⁰⁷ See authorities collected in 12 L. R. A. (N. S.) 624, note.

²⁰⁸ *Hogle v. New York Cent. & H. R. R. Co.*, 28 Hun (N. Y.) 363. See authorities collected in 12 L. R. A. (N. S.) 526, note, and 49 L. R. A. (N. S.) 166, note.

²⁰⁹ 10 M. & W. 546.

²¹⁰ To this case *McLain, J.*, of the Mississippi Supreme Court, has paid the following tribute: "The groans, ineffably and mournfully sad, of Davies' dying donkey, have resounded around the earth. The last lingering gaze from the soft, mild eyes of this docile animal,

plaintiff's negligence will not defeat recovery if defendant could have avoided inflicting the harm, had he exercised proper care after discovering the danger, or, as it has been tersely put, "the party who last has a clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent is considered solely responsible for it."²¹¹ The negligent conduct of the plaintiff is not then a cause, but a condition.²¹² Thus plaintiff may not have displayed proper caution in going or remaining upon the track of a railroad, but this will not relieve the engineer from the duty to exercise due care to avoid injuring him after his presence became known,²¹³ or, as some courts have held with varying degrees of strictness, after the engineer would have made discovery, had he exercised proper foresight.²¹⁴

The doctrine of the "last clear chance" is well established.²¹⁵ It is frequently declared to be irreconcilable with

like the last parting sunbeams of the softest day in spring, has appealed to and touched the hearts of men. There has girdled the globe a band of sympathy for Davies' immortal 'critter.' Its ghost, like Banquo's ghost, will not down at the behest of the people who are charged with inflicting injuries, nor can its groanings be silenced by the rantings and excoriations of carping critics." *Fuller v. Illinois Cent. R. Co.*, 100 Miss. 705, 717, 56 South. 783.

²¹¹ 2 Law Quarterly Rev. 507.

²¹² *Louisville & N. R. Co. v. East Tennessee, V. & G. R. Co.*, 60 Fed. 993, 996, 9 C. C. A. 314.

²¹³ *Waterman v. Visalia Electric R. Co.* (1913) 23 Cal. App. 350, 137 Pac. 1096; *Krenzer v. Pittsburg, C., O. & St. L. Ry. Co.*, 151 Ind. 587, 43 N. E. 649, 52 N. E. 220, 68 Am. St. Rep. 252; *Tempfer v. Joplin & P. Ry. Co.*, 89 Kan. 374, 131 Pac. 592; *Bragg v. Central New England Ry. Co.*, 152 App. Div. 444, 137 N. Y. Supp. 273; *Iowa Cent. Ry. Co. v. Walker*, 203 Fed. 685, 121 C. C. A. 579.

²¹⁴ *Denver & R. G. R. Co. v. Buffehr*, 30 Colo. 27, 69 Pac. 582; *Guenther v. St. Louis, I. M. & S. Ry. Co.*, 108 Mo. 18, 18 S. W. 846; *Pickett v. Wilmington & W. R. Co.*, 117 N. C. 616, 23 S. E. 264, 30 L. R. A. 257, 53 Am. St. Rep. 611; *Richmond Traction Co. v. Martin's Adm'r*, 102 Va. 209, 45 S. E. 886.

²¹⁵ For illustrative cases, see *Cincinnati, H. & D. R. Co. v. Kassen*, 49 Ohio St. 230, 31 N. E. 282, 16 L. R. A. 674; *Inland & Seaboard Coasting Co. v. Tolson*, 139 U. S. 551, 11 Sup. Ct. 653, 35 L. Ed. 270; *Radley v. London & N. Ry. Co.*, L. R., 1 App. Cas. 754. See, also, 55 L. R. A. 418, note; "Davies v. Mann: Theory of Contributory Negligence," by William Schofield, 3 Harv. Law Rev. 263.

or an exception to the doctrine of contributory negligence, but rightly considered it is neither. The question is simply whether plaintiff's negligence is a remote or proximate cause of the injury. If it precedes in point of time the negligence of the defendant it is a remote cause, and will not bar recovery where the injury could have been prevented by the exercise of reasonable care on the part of the defendant.²¹⁶ "Thus it appears that where the doctrine of *Davies v. Mann* is applicable it *excludes* contributory negligence."²¹⁷ The difficulty is due largely to an unfortunate tendency to give the last clear chance doctrine to juries as a hit or miss rule without discrimination.²¹⁸

Presupposing, as it does, that "the defendant's opportunity of preventing the injury by the exercise of due care was later in point of time than that of the plaintiff,"²¹⁹ it has been said that the principle cannot apply "where the negligence of both continues down to the moment of the accident and contributes to the injury," the case then becoming one of concurring negligence.²²⁰ To illustrate: Suppose the plaintiff has negligently placed himself in a position of threatened danger from contact with some agency under defendant's control, where the situation is such that plaintiff cannot by the exercise of due care extricate himself in time to avoid injury, but the defendant by the

²¹⁶ *Farmer v. Wilmington & W. R. Co.*, 88 N. C. 564.

²¹⁷ *Smith v. Norfolk & S. R. Co.*, 114 N. C. 728, 752, 19 S. E. 863, 923, 25 L. R. A. 287.

²¹⁸ Cf. *Drown v. Northern Ohio Traction Co.*, 76 Ohio St. 234, 81 N. E. 326, 10 L. R. A. (N. S.) 421, 118 Am. St. Rep. 844.

²¹⁹ *INDIANAPOLIS TRACTION & TERMINAL CO. v. CROLY* (1911) 54 Md. App. 566, 96 N. E. 973, 979, 98 N. E. 1091, Chapin Cas. Torts, 354.

²²⁰ *Roanoke Ry. & Electric Co. v. Carroll*, 112 Va. 598, 604, 72 S. E. 125. In accord, *Birmingham, Ry., Light & Power Co. v. Aetna Accident & Liability Co.*, 184 Ala. 601, 64 South. 44; *Green v. Los Angeles Term Ry. Co.*, 143 Cal. 31, 76 Pac. 719, 101 Am. St. Rep. 68; *Hammers v. Colorado Southern N. O. & P. R. Co.*, 128 La. 648, 55 South. 4, 34 L. R. A. (N. S.) 685; *Drown v. Northern Ohio Traction Co.*, 76 Ohio St. 234, 81 N. E. 326, 10 L. R. A. (N. S.) 421, 118 Am. St. Rep. 844; *Denver City Tramway Co. v. Cobb*, 164 Fed. 41, 90 C. C. A. 459.

exercise of due care could prevent it and fails to do so; e. g., if plaintiff should negligently go on a railroad track and become unconscious. Here the effect of the plaintiff's negligence ceases after he reaches a situation where due care on his part would be unavailing, and subsequent negligence on defendant's part can properly be treated as the proximate cause. On the other hand, suppose the plaintiff, when the point of collision is reached, is not helpless, but is in a position to aid himself, and by the vigilant use of his eyes, ears, and physical strength to extricate himself and avoid injury, as where he is walking upon the track, taking no note of his surroundings. Here three situations may arise: First. The engineer may not have seen him. Although the engineer may have been negligent in failing to keep a lookout, yet plaintiff should not be permitted to recover. The want of care of both parties has here continued down to the time of the injury. Hence plaintiff's negligence is concurrent, and not antecedent. The test has been said to be, "What wrongful conduct occasioning the injury was in operation at the very moment it occurred or became inevitable? If, just before the climax, one party only had the power to prevent the injury, and he neglected to make use of it, the responsibility is his alone; but if each had the power to avoid such injury, and each failed to use it, then their negligence is concurrent, and neither can recover."²²¹ Second. Suppose the engineer saw plaintiff in time to have avoided injuring him, and he observes that plaintiff is and will remain oblivious of the approaching danger. Logically this should give to the engineer the last clear chance of avoiding the injury, though some courts base plaintiff's right of recovery on the ground of the engineer's willfulness. Third. Suppose the engineer saw the plaintiff, and no facts were presented which would lead him to suppose that the situation was one where plaintiff could not and would not learn of the danger and take advantage of the opportunity at his disposal to avoid it. Surely an engineer is

²²¹ INDIANAPOLIS TRACTION & TERMINAL CO. v. CROLY (1911) 54 Ind. App. 566, 96 N. E. 973, 980, 98 N. E. 1091, Chaplin Cas. Torts, 354, per Laury, J.

not required to stop his train whenever he sees a man on the track, for he has a right to believe that the latter, if not apparently helpless, will heed the whistle or other proper signals, and step aside. In such a case it is believed that the doctrine of the last clear chance can have no operation.²²²

Children and Other Incompetents

An infant too young to possess and exercise discretion in the care of himself—*non sui juris*—cannot be charged with contributory negligence. "From the nature of the case it is impossible to prescribe a fixed period when a child becomes *sui juris*. Some children reach the point earlier than others. It depends upon many things, such as natural capacity, physical conditions, training, habits of life, and surroundings. These and other circumstances may enter into the question. It becomes, therefore, a question of fact for the jury, where the inquiry is material, unless the child is of so very tender years that the court can safely decide the fact."²²³ Infants under six have generally been found *non sui juris*,²²⁴ and there are cases so holding where the infant was older.²²⁵ But, though

²²² Cf. INDIANAPOLIS TRACTION & TERMINAL CO. v. CROLY (1911) 54 Ind. App. 566, 96 N. E. 973, 98 N. E. 1091, Chapin Cas. Torts, 354; Welsh v. Tri-City Ry. Co., 148 Iowa, 200, 126 N. W. 1118; French v. Grand Trunk Ry. Co., 76 Vt. 441, 58 Atl. 722; Southern Ry. v. Bailey, 110 Va. 833, 67 S. E. 365, 27 L. R. A. (N. S.) 379.

²²³ STONE v. DRY DOCK, E. B. & B. R. CO., 115 N. Y. 104, 110, 21 N. E. 712, Chapin Cas. Torts, 363, per Andrews, J.

²²⁴ Between five and six: Johnson v. Bay City, 164 Mich. 251, 129 N. W. 29, Ann. Cas. 1912B, 866; Fallon v. Central Park N. & E. R. Co., 64 N. Y. 13 (but cf. Cosgrove v. Ogden, 49 N. Y. 255, 10 Am. Rep. 361); Schnur v. Citizens' Traction Co., 153 Pa. 29, 25 Atl. 650, 34 Am. St. Rep. 680; American Tobacco Co. v. Polisco, 104 Va. 777, 52 S. E. 563. Between four and five; Louisville & N. R. Co. v. Arp, 136 Ga. 489, 71 S. E. 867; Allegheny Coke Co. v. Massey, 163 Ky. 792, 174 S. W. 499; Birkett v. Knickerbocker Ice Co., 110 N. Y. 504, 18 N. E. 108. Up to four: True & True Co. v. Woda, 201 Ill. 315, 66 N. E. 369; Ihl v. Forty-Second St. & G. St. Ferry R. Co., 47 N. Y. 317, 7 Am. Rep. 450; Wise & Co. v. Morgan, 101 Tenn. 273, 48 S. W. 971, 44 L. R. A. 548.

²²⁵ Illinois Cent. R. Co. v. Jernigan, 198 Ill. 297, 65 N. E. 88; Dodd v. Spartanburg Ry., Gas & Electric Co., 95 S. C. 9, 78 S. E. 525. Cf. Costello v. Third Ave. R. Co., 161 N. Y. 317, 55 N. E. 897.

the child may have attained an age when he may be responsible for his contributory negligence, he will not necessarily be held to the standard of care of the adult. Upon emerging from the condition of an infant *non sui juris*, he will be required only to exercise that degree of care and caution which should be expected from one of his age, experience, and intelligence.²²⁶

A similar ruling should be applied to a person who is *non compos mentis*. Such a one must exercise the degree of care commensurate with his capacity.²²⁷ If, however, the party is mentally competent, but deficient in one or more of his faculties, he will be held to the standard of care of a reasonable man who labors under a like disability. His affliction should "prompt him to employ his other faculties so as to compensate as far as possible for the lacking one."²²⁸ For instance, a reasonably prudent man, who was deaf, would exercise greater care in keeping a proper lookout,²²⁹ and one whose eyesight was impaired would not rely solely on such powers of vision as he possesses.²³⁰ With respect to the man totally blind there does not appear to be any rule of law making it negligence for him to go unattended upon the streets. "The fact of blindness, coupled with the presence in public places of one thus afflicted, is not *per se* conclusive proof of negligence in the blind person." It is analogous to traveling

²²⁶ *Plumley v. Birge*, 124 Mass. 57, 28 Am. Rep. 645; *Jackson v. Butler*, 249 Mo. 342, 155 S. W. 1071; *David v. West Jersey & S. R. Co.*, 84 N. J. Law, 685, 87 Atl. 440; *Jacobs v. H. J. Koehler Sporting Goods Co.*, 208 N. Y. 416, 102 N. Y. 519; *Costello v. Third Ave. R. Co.*, 161 N. Y. 317, 55 N. E. 897; *Quinn v. Ross Motor Car Co.*, 157 Wis. 543, 147 N. W. 1000.

²²⁷ *Johnson v. St. Paul City Ry. Co.*, 67 Minn. 260, 69 N. W. 900, 36 L. R. A. 586; *Seattle Electric Co. v. Hovden*, 190 Fed. 7, 111 C. C. A. 191; *Thompson on Negligence* (2d Ed.) vol. 1, § 338. But see *Worthington v. Mencer*, 96 Ala. 310, 11 South. 72, 17 L. R. A. 407.

²²⁸ *Purl v. St. Louis, K. C. & N. Ry. Co.*, 72 Mo. 168, 172.

²²⁹ *Fenneman v. Holden*, 75 Md. 1, 22 Atl. 1049; *Purl v. St. Louis, K. C. & N. Ry. Co.*, *supra*; *Thompson v. Salt Lake Rapid Transit Co.*, 16 Utah, 281, 52 Pac. 92, 40 L. R. A. 172, 67 Am. St. Rep. 621. Cf. *Carroll v. Chicago, B. & Q. Ry. Co.*, 142 Ill. App. 195.

²³⁰ See *Fusilli v. Missouri Pac. Ry. Co.*, 45 Mo. App. 535; *Marks' Adm'r v. Petersburg R. Co.*, 88 Va. 1, 13 S. E. 299; *McKinney v. Chicago & N. R. Co.*, 87 Wis. 282, 58 N. W. 386.

upon a highway on a dark night, when every man is practically blind. "In the one case, as well as in the other, the lack of the power to see must be taken into the account, and the conduct of the person thus hindered must be considered, and he must be held to such requirement of action as is reasonable in the peculiar situation in which he is found. He must be more cautious. He must bring about him greater guards, and go more slowly and tentatively, than if he had his eyesight, or the light of day shone upon him. And it remains the question whether the blind man, or the man in the dark, did so conduct himself, as he was bound to do under the circumstances and as would bring his acts up to the rule of that care and prudence which an ordinarily cautious person would use in a like position."²⁸¹ But by this it is not meant that a blind man unattended may go wherever the man with sight may be, provided he exercises proper precautions. "It is gross negligence in a blind man to expose himself alone in any situation where he knows that the faculty of sight is absolutely necessary to the safety of life and limb"; e. g., a network of railroad tracks, where engines and cars are constantly moving.²⁸² If the incapacity results from voluntary intoxication, it cannot be taken into consideration, for one may not by his own act succeed in lowering the standard of care which the law exacts.²⁸³

Persons in Peril

It has been seen that the act of escaping from a peril created by defendant's negligence will not be deemed voluntary so as to cut the chain of causation.²⁸⁴ One who is

²⁸¹ *Harris v. Uebelhoer*, 75 N. Y. 169, 175, per Folger, J. In accord, *Smith v. Wildes*, 143 Mass. 556, 10 N. E. 446; *Rosenthal v. Chicago & Alton R. Co.*, 255 Ill. 552, 99 N. E. 672.

²⁸² *Florida Cent. & P. R. Co. v. Williams*, 37 Fla. 406, 418, 20 South. 558.

²⁸³ *Johnson v. Louisville & N. R. Co.*, 104 Ala. 241, 16 South. 75, 53 Am. St. Rep. 39; *Keeshan v. Elgin, A. & S. Traction Co.*, 229 Ill. 533, 82 N. E. 360; *Bageard v. Consolidated Traction Co.*, 64 N. J. Law, 316, 45 Atl. 620, 49 L. R. A. 424, 81 Am. St. Rep. 498; *Smith v. Norfolk & S. R. Co.*, 114 N. C. 728, 19 S. E. 863, 923, 25 L. R. A. 287; *Burleson v. Morrisville Lumber & Power Co.*, 86 Vt. 492, 86 Atl. 745.

²⁸⁴ See *supra*, p. 89 et seq.

injured while endeavoring to remove himself from jeopardy will not be considered guilty of negligence merely because he may have failed to adopt the wisest course. It must be kept in mind that here the party must make an instant decision, and it is only required that he act in good faith as an ordinary man might have done under like conditions. The propriety of his act cannot be judged by the result.²³⁵ But the circumstances must be such as to create fear or apprehension in the mind of the ordinarily careful person, or, put another way, there must be a reasonable apprehension of danger.²³⁶ Furthermore, the emergency must not have been created wholly or in part by the negligence of the injured party. "A person may be excused for making a mistake when suddenly confronted with imminent danger, provided—and only provided—he was without fault in getting into the dangerous situation."²³⁷ Still one cannot be charged with negligence *per se* because he voluntarily placed himself in a position of danger for the purpose of saving human life.²³⁸ True, the rescuer owed no duty to a third person imperiled by defendant's negligence, and yet he may recover unless his act was one of rashness, for the law has high regard for human life.²³⁹ But this is not true where the object

²³⁵ *Tousley v. Pacific Electric Ry. Co.*, 166 Cal. 457, 137 Pac. 31; *Illinois Cent. R. Co. v. Wilkins*, 149 Ky. 35, 147 S. W. 759; *Tuttle v. Atlantic City R. Co.*, 66 N. J. Law, 327, 49 Atl. 450, 54 L. R. A. 582, 88 Am. St. Rep. 491; *Remier v. Long Island R. Co.*, 48 Hun, 352, 1 N. Y. Supp. 124, affirmed 113 N. Y. 669, 21 N. E. 1116; *Centofanti v. Pennsylvania R. Co.*, 244 Pa. 255, 90 Atl. 558.

²³⁶ *Millers Creek R. Co. v. Barnett*, 159 Ky. 344, 167 S. W. 402; *Texas Midland R. Co. v. Booth* (1904) 35 Tex. Civ. App. 322, 80 S. W. 121.

²³⁷ *New York Transp. Co. v. O'Donnell*, 159 Fed. 659, 660, 86 C. C. A. 527, per Noyes, J. In accord, *Briscoe v. Southern Ry. Co.*, 103 Ga. 224, 28 S. E. 638; *Neumann v. Hudson County Consumers' Brewing Co.*, 155 App. Div. 271, 139 N. Y. Supp. 1028; *Chesapeake & O. R. Co. v. Hall's Adm'r*, 109 Va. 296, 63 S. E. 1007.

²³⁸ *Manzella v. Rochester Ry. Co.*, 105 App. Div. 12, 93 N. Y. Supp. 457. And see *supra*, p. 97.

²³⁹ *West Chicago St. R. Co. v. Lilderman*, 187 Ill. 463, 58 N. E. 367, 52 L. R. A. 655, 79 Am. St. Rep. 226; *Dixon v. New York, N. H. & H. R. Co.*, 207 Mass. 126, 92 N. E. 1030; *Perplch v. Leetonia Mining Co.*, 118 Minn. 508, 137 N. W. 12; *ECKERT v. LONG ISLAND R. CO.*,

is to save property. The act may not constitute negligence *per se*, but here the standard is that of the ordinary man; it not being sufficient to show merely that the injured party did not act rashly.²⁴⁰

Imputed Negligence

The negligence of a third party cannot, as a general rule, be invoked by defendant. Thus the culpable omission of a tenant cannot be attributed to the landlord, so as to bar recovery by the latter,²⁴¹ nor is the negligence of the landlord to be urged against the tenant,²⁴² nor that of a bailee against a bailor.²⁴³ Nor can a passenger in a public or hired vehicle,²⁴⁴ or one who as a guest is riding in a private

43 N. Y. 502, 3 Am. Rep. 721, Chapin Cas. Torts, 49; Corbin v. City of Philadelphia, 195 Pa. 461, 45 Atl. 1070, 49 L. R. A. 715, 78 Am. St. Rep. 825.

²⁴⁰ See Liming v. Illinois Cent. Ry. Co., 81 Iowa, 246, 47 N. W. 66; Wilson v. Central of Georgia Ry. Co., 132 Ga. 215, 63 S. E. 1121; Taylor v. Home Telephone Co., 163 Mich. 458, 128 N. W. 728, 31 L. R. A. (N. S.) 385; Wasmer v. Delaware, L. & W. R. Co., 80 N. Y. 212, 36 Am. Rep. 608 (cf. Morris v. Lake Shore & M. S. Ry. Co., 148 N. Y. 182, 42 N. E. 579); McKay v. Atlantic Coast Line R. Co., 160 N. C. 260, 75 S. E. 1081, Ann. Cas. 1914C, 412; Thompson v. Seaboard Air Line Ry., 81 S. C. 333, 62 S. E. 396, 20 L. R. A. (N. S.) 426.

²⁴¹ Higgins v. Los Angeles Gas & Electric Co., 159 Cal. 651, 115 Pac. 313, 34 L. R. A. (N. S.) 717; Wiley v. West Jersey R. Co., 44 N. J. Law, 247.

²⁴² Contos & Metrakas v. Jamison & Morris, 81 S. C. 488, 62 S. E. 867, 19 L. R. A. (N. S.) 498.

²⁴³ Spelman v. Delano, 177 Mo. App. 28, 163 S. W. 300; New York, L. E. & W. R. Co. v. New Jersey Electric Ry. Co., 60 N. J. Law, 338, 38 Atl. 828; Gibson v. Bessemer & L. E. R. Co., 226 Pa. 198, 75 Atl. 194, 27 L. R. A. (N. S.) 689, 18 Ann. Cas. 535.

²⁴⁴ Thompson v. Los Angeles & S. D. B. Ry. Co., 165 Cal. 748, 134 Pac. 709; Chicago Union Traction Co. v. Leach, 215 Ill. 184, 74 N. E. 119; Randolph v. O'Riordon, 155 Mass. 331, 29 N. E. 583; New York, L. E. & W. R. Co. v. Steinbrenner, 47 N. J. Law, 161, 54 Am. Rep. 126, note; Little v. Hackett, 116 U. S. 366, 6 Sup. Ct. 391, 29 L. Ed. 652; Matthews v. London St. Tramways Co., 60 L. T. Rep. N. S. 47. Cf. Kellogg v. Church Charity Foundation of Long Island, 203 N. Y. 191, 96 N. E. 406, 38 L. R. A. (N. S.) 481, Ann. Cas. 1913A, 883. The contrary doctrine, declared in Thorogood v. Bryan, 8 C. B. 115, has been repudiated. The Bernina, 58 L. T. Rep. N. S. 423, 13 H. L. App. Cas. 1; Matthews v. London Street Tramways Co., supra.

vehicle,²⁴⁵ be charged with the want of care of a driver over whom he had no control, and thus prevented from recovering against one whose negligence concurred with that of the driver.²⁴⁶ But negligence may be imputed where the culpable party occupies such a position with respect to the injured plaintiff as normally to subject the latter to liability under the doctrine *respondeat superior*, as where the relation of master and servant exists;²⁴⁷ also where both are engaged in a common enterprise.²⁴⁸

Illustrations of imputed negligence are found in actions brought by the husband,²⁴⁹ or parent,²⁵⁰ to recover for loss of the wife's consortium, or for loss of service, or for medical expenses consequent upon physical injuries sustained by the wife or child. Recovery is here denied where the negligence of wife or child combined with that of defend-

²⁴⁵ *North Alabama Traction Co. v. Thomas*, 164 Ala. 191, 51 South. 418; *Noyes v. Boscawen*, 64 N. H. 361, 10 Atl. 690, 10 Am. St. Rep. 410; *Horandt v. Central R. Co., of New Jersey*, 81 N. J. Law, 488, 83 Atl. 511; *Dyer v. Erie Ry. Co.*, 71 N. Y. 228; *Atlantic & Danville R. Co. v. Ironmonger*, 95 Va. 625, 29 S. E. 319. Negligence of a husband in operating a vehicle will not be imputed to his wife, who is accompanying him, they not being engaged in a joint or common enterprise, no relation of principal and agent existing, and she having no control over the operation. *Fisher v. Ellston* (Iowa, 1916) 156 N. W. 422.

²⁴⁶ The passenger, however, has an individual duty to watch for and avoid danger. *Clarke v. Connecticut Co.*, 83 Conn. 219, 76 Atl. 523; *Whitman v. Fisher*, 98 Me. 575, 57 Atl. 895; *Brickell v. New York Cent. & H. R. R. Co.*, 120 N. Y. 290, 24 N. E. 449, 17 Am. St. Rep. 648; *WENTWORTH v. TOWN OF WATERBURY* (Vt. 1916) 96 Atl. 334, *Chapin Cas. Torts*, 366; but cf. *Carnegie v. Great Northern Ry. Co.*, 128 Minn. 14, 150 N. W. 164.

²⁴⁷ *Read v. City & Suburban Ry. Co.*, 115 Ga. 366, 41 S. E. 629; *Louisville, N. A. & O. Ry. Co. v. Stommel*, 126 Ind. 35, 25 N. E. 863; *La Riviere v. Pemberton*, 46 Minn. 5, 48 N. W. 406; *Wood v. Coney Island & B. R. Co.*, 133 App. Div. 270, 117 N. Y. Supp. 703.

²⁴⁸ *WENTWORTH v. TOWN OF WATERBURY* (Vt. 1916) 96 Atl. 334, *Chapin Cas. Torts*, 366. Cf. *Koplitz v. City of St. Paul*, 86 Minn. 373, 90 N. W. 794, 58 L. R. A. 74.

²⁴⁹ *Winner v. Oakland Township*, 158 Pa. 405, 410, 27 Atl. 1110, 1111; *Chicago, B. & Q. R. Co. v. Honey*, 63 Fed. 39, 12 C. C. A. 190, 26 L. R. A. 42.

²⁵⁰ *Wueppesahl v. Connecticut Co.*, 87 Conn. 710, 89 Atl. 166.

ant. Likewise the contributory negligence of the deceased, since it would have been a defense to any action brought by him, had he survived, is held a bar to recovery under statutes giving a cause of action for death.²⁵¹ Like effect has been given,²⁵² and refused,²⁵³ to the negligence of the beneficiary, or of one for whose neglect the beneficiary was responsible. The question is one of statutory construction.

Suppose the injured person is a child of such tender years as to be unable to exercise care—*non sui juris*—may there be imputed to him the negligence of his parent or guardian in exposing him to danger? New York answered in the affirmative in *Hartfield v. Roper*.²⁵⁴ Here a child of two years had been injured while playing in a public highway. The infant, it was said, "belongs to another, to whom discretion in the care of his person is exclusively confided. That person is keeper and agent for this purpose, and in respect to third persons his act must be deemed that of the infant; his neglect, the infant's neglect." * * * If his proper agent and guardian has suffered him to incur mischief, it is much more fit that he should look for redress to that guardian." This is the settled doctrine in that state.²⁵⁵ Though followed to a very

²⁵¹ *Indiana, B. & W. Ry. Co. v. Greene*, 106 Ind. 279, 6 N. E. 603, 55 Am. Rep. 736; *Slattery v. New York, N. H. & H. R. Co.*, 203 Mass. 453, 89 N. E. 622, 133 Am. St. Rep. 311; *Saner v. Lake Shore & M. S. Ry. Co.*, 108 Mich. 31, 65 N. W. 624; *Flaherty v. Meade Transfer Co.*, 157 App. Div. 417, 142 N. Y. Supp. 357.

²⁵² *Alabama G. S. R. Co. v. Burgess*, 116 Ala. 509, 22 South. 913; *Harton v. Forest City Telephone Co.*, 141 N. C. 455, 54 S. E. 299; *Darbrinsky v. Pennsylvania Co.*, 248 Pa. 503, 94 Atl. 269, L. R. A. 1915E, 781; *Ploof v. Burlington Traction Co.*, 70 Vt. 509, 41 Atl. 1017, 43 L. R. A. 108; *Dickinson v. Stuart Colliery Co.*, 71 W. Va. 325, 76 N. E. 654, 43 L. R. A. (N. S.) 335. Cf. *Evansville & C. R. Co. v. Wolf*, 59 Ind. 89.

²⁵³ *Southern Ry. Co. v. Shipp*, 169 Ala. 327, 53 South. 150; *Wymore v. Mahaska County*, 78 Iowa, 396, 43 N. W. 264, 6 L. R. A. 545, 16 Am. St. Rep. 449; *McKay v. Syracuse Rapid Transit Ry. Co.*, 208 N. Y. 359, 101 N. E. 885; *Norfolk & W. R. Co. v. Groseclose's Adm'r*, 88 Va. 267, 13 S. E. 454, 29 Am. St. Rep. 718.

²⁵⁴ 21 Wend. (N. Y.) 615, 34 Am. Dec. 273.

²⁵⁵ *Jacobs v. H. J. Koehler Sporting Goods Co.*, 208 N. Y. 416, 418, 102 N. E. 519; *Weil v. Dry Dock, E. B. & B. R. Co.*, 119 N. Y. 147, 23 N. E. 487; *Birkett v. Knickerbocker Ice Co.*, 110 N. Y. 504, 18 N. E.

limited extent,²⁵⁶ it has been regarded as unsound by the great weight of authority. "How does the custody of the infant," it has been asked, "justify or lead to the imputation of another's fault to him? The law, natural and civil, puts the infant under the care of the adult; but how can this right to care for and protect be construed into a right to waive or forfeit any of the legal rights of the infant? The capacity to make such waiver or forfeiture is not a necessary, or even convenient, incident of this office of the adult, but, on the contrary, is quite inconsistent with it, for the power to protect is the opposite of the power to harm, either by act or omission."²⁵⁷ "It is the old doctrine of the father eating grapes, and the child's teeth being set on edge."²⁵⁸

Burden of Proof

It would seem that logically contributory negligence should be treated as an affirmative defense, and by the weight of authority the burden of its establishment is placed upon defendant,²⁵⁹ who may, however, take advantage of

108; *Kunz v. City of Troy*, 104 N. Y. 344, 10 N. E. 442, 58 Am. Rep. 508. If the child is *sui juris*, the doctrine does not apply. *Lafferty v. Third Ave. R. Co.*, 85 App. Div. 592, 83 N. Y. Supp. 405, affirmed 176 N. Y. 594, 68 N. E. 1118.

²⁵⁶ *Kyne v. Wilmington & N. R. Co.*, 8 Houst. (13 Del.) 185, 14 Atl. 922; *Gibbons v. Williams*, 135 Mass. 333; *Delaware, L. & W. R. Co. v. Devore*, 114 Fed. 155, 52 C. C. A. 77. Cf. *Leslie v. City of Lewiston*, 62 Me. 468.

²⁵⁷ *NEWMAN v. PHILLIPSBURG HORSE CAR R. CO.*, 52 N. J. Law, 446, 448, 19 Atl. 1102, 8 L. R. A. 842, Chapin Cas. Torts, 369, per Beasley, C. J. In accord, *Denver City Tramway Co. v. Brown* (1914) 57 Colo. 484, 143 Pac. 364; *Union Pac. Ry. Co. v. Young*, 57 Kan. 168, 45 Pac. 580; *Warren v. Manchester St. Ry.*, 70 N. H. 352, 47 Atl. 735; *Mattson v. Minnesota & N. W. R. Co.*, 95 Minn. 477, 104 N. W. 443, 70 L. R. A. 503, 111 Am. St. Rep. 483, 5 Ann. Cas. 498; *Erie City Pass. Ry. Co. v. Schuster*, 113 Pa. 412, 6 Atl. 269, 57 Am. Rep. 471; *City of Roanoke v. Shull*, 97 Va. 419, 34 S. E. 34, 75 Am. St. Rep. 791.

²⁵⁸ *Bellefontaine & I. R. Co. v. Snyder*, 18 Ohio St. 399, 409, 98 Am. Dec. 175, per Welch, J.

²⁵⁹ *Vanceburg Telephone Co. v. Bevis*, 148 Ky. 285, 146 S. W. 420; *Lammers v. Great Northern Ry. Co.*, 82 Minn. 120, 84 N. W. 728; *Von Trebra v. Laclede Gaslight Co.*, 209 Mo. 648, 108 S. W. 559; *Danskin v. Pennsylvania R. Co.*, 79 N. J. Law, 526, 76 Atl. 975; *Sey-*

any facts pleaded or proved by plaintiff.²⁶⁰ But in a number of states the plaintiff must show his own freedom from contributory negligence. In support of the latter view it has been said that: "It was necessary for the plaintiff to prove, first, negligence on the part of the defendant; * * * and, secondly, that the injury to the plaintiff occurred in consequence of that negligence. But, in order to prove this latter part, the plaintiff must show that such injury was not caused in whole or in part, by his own negligence; for, although the defendant was guilty of negligence, if the plaintiff's negligence contributed essentially to the injury, it is obvious that it did not occur by reason of the defendant's negligence. * * * Hence, to say that the plaintiff must show" the absence of contributory negligence "is only saying that he must show that the injury was owing to the negligence of the defendant."²⁶¹ This does not require that there should be direct evidence upon the point, for freedom from contributory negligence may be successfully shown by the surrounding circumstances. If the latter reasonably indicate that the injury might have occurred without the negligence of the injured party, an inference

mer v. Town of Lake, 66 Wis. 651, 29 N. W. 554; *Texas & P. Ry. Co. v. Volk*, 151 U. S. 73, 14 Sup. Ct. 239, 38 L. Ed. 78.

²⁶⁰ *Philadelphia, B. & W. R. Co. v. Hand*, 101 Md. 233, 61 Atl. 285; *Hudson v. Wabash Western Ry. Co.*, 101 Mo. 13, 14 S. W. 15. See *Western & A. R. Co. v. Casteel*, 138 Ga. 579, 75 S. E. 609; *McManamon v. Hanover Township*, 232 Pa. 439, 81 Atl. 440; *Interstate R. Co. v. Tyree*, 110 Va. 38, 65 S. E. 500; *Gill v. Homrighausen*, 79 Wis. 634, 48 N. W. 862.

²⁶¹ *Park v. O'Brien*, 23 Conn. 339, 345, per Storrs, J. In accord, *West Chicago St. R. Co. v. Lilderman*, 187 Ill. 463, 58 N. E. 367, 52 L. R. A. 655, 79 Am. St. Rep. 226; *Dreler v. McDermott*, 157 Iowa, 726, 141 N. W. 315, 50 L. R. A. (N. S.) 566; *Rohlf's v. Township of Fairgrove*, 174 Mich. 555, 140 N. W. 908; *Whalen v. Citizens' Gas-light Co.*, 151 N. Y. 70, 45 N. E. 363. But see *Code Civ. Proc. N. Y. § 841b*, providing that "on the trial of any action to recover damages for causing death the contributory negligence of the person killed shall be a defense, to be pleaded and proven by the defendant." *Sackheim v. Pigueron*, 215 N. Y. 62, 109 N. E. 109. In Maine the statute is broader, as it includes cases of "injury to a person who is deceased at the time of trial." *Curran v. Lewiston, A. & W. Ry. Co.*, 112 Me. 96, 90 Atl. 973.

to that effect becomes possible. "If, on the other hand, those facts and circumstances, coupled with the occurrence of the accident, do not indicate or tend to establish the existence of some cause or occasion of the latter which is consistent with the exercise of proper prudence and care, then the inference of negligence is the only one left to be drawn, and the burden resting upon the plaintiff is not successfully borne, and a nonsuit for that reason becomes inevitable."²⁶² In states where plaintiff must establish his lack of contributory negligence, the courts are not in accord as to whether he should plead it. In New York, for instance, where he is not obliged to do so, it has been said "substantially that allegation is always involved in the averment that the injury set out was occasioned by the defendant's negligence."²⁶³

²⁶² Tolman v. Syracuse, B. & N. Y. R. Co., 98 N. Y. 198, 203, 50 Am. Rep. 649, per Finch, J. In accord, Wood v. City of Danbury, 72 Conn. 69, 43 Atl. 554; Murphy v. Chicago, R. I. & P. R. Co., 45 Iowa, 661; Hinckley v. Cape Cod R. Co., 120 Mass. 257.

²⁶³ Lee v. Troy Citizens' Gas Light Co., 98 N. Y. 115, 119. In accord, Brockett v. Fair Haven & W. R. Co., 73 Conn. 428, 47 Atl. 763; Thompson v. Flint & P. M. Ry. Co., 57 Mich. 300, 23 N. W. 820. Cf. Jamison v. Myrtle Lodge, No. 355, A. F. & A. M., 158 Iowa, 264, 139 N. W. 547.

CHAPTER XX

NUISANCE

- 114. Definition.
- 115. Public and Private Nuisances.
- 116. Nuisances *per Se* and *per Accidens*.
- 117. Remedies.

DEFINED

114. Nuisance consists in an unlawful act or omission, constituting an interference with the enjoyment of a legal right.

It must be admitted that the above ¹ is so indefinite as to be almost valueless. But "for time out of mind, the term 'nuisance' has been regarded as incapable of definition, so as to fit all cases, because the controlling facts are seldom alike, and each case stands on its own footing." ² It is derived from the Latin "*nocere*" (French "*nuire*"), to harm, and, in the ordinary sense, anything which produces harm or annoyance, or, in the quaint phrase of ancient times, "that which worketh hurt," is a nuisance. When will this hurt or annoyance constitute a legal wrong? ³ The pollution of air ⁴ or

¹ Which is taken substantially from Cooley on Torts (3d Ed.) 1174.

² Melker v. City of New York, 190 N. Y. 481, 487, 83 N. E. 565, 16 L. R. A. (N. S.) 621, 13 Ann. Cas. 544, per Vann, J. See Joyce on Nuisances, p. 1 et seq., where many attempts at definition are collected.

³ The term "is applied to that class of wrongs that arise from the unreasonable, unwarrantable, or unlawful use by a person of his own property, real or personal, or from his own improper, indecent, or unlawful personal conduct, working an obstruction of or injury to a right of another or of the public, and producing such material annoyance, inconvenience, discomfort, or hurt that the law will presume a consequent damage." Wood on Nuisances (3d Ed.) 1.

⁴ Roessler & Hasslacher Chemical Co. v. Doyle, 73 N. J. Law, 521, 64 Atl. 156; Campbell v. Seaman, 63 N. Y. 568, 20 Am. Rep. 567; Pennsylvania Lead Co.'s Appeal, 96 Pa. 116, 42 Am. Rep. 534, note;

water,⁵ noise,⁶ jarring and concussion,⁷ the maintenance of a house of assignation,⁸ or of a structure which is so defectively constructed or in such a state of disrepair as to be dangerous,⁹ the keeping of a dog with knowledge that it has vicious propensities,¹⁰ and the obstruction of navigable streams¹¹ and public highways,¹² are examples which indicate the dissimilarity of facts out of which this tort may arise.

Nuisance and Trespass

Nuisance differs from trespass, in that the injury is consequential; whereas, trespass is committed by the direct application of force, there being an immediate invasion of a right. In some cases the party wronged may have his election to proceed on either theory. For instance, one may be guilty of nuisance if he maintain a powder factory

Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 2 Sup. Ct. 719, 27 L. Ed. 739.

⁵ *Nolan v. City of New Britain*, 69 Conn. 668, 38 Atl. 703; *Barrow v. Gaillardanne*, 122 La. 558, 47 South. 891; *Attorney-General v. Steward & Taylor*, 20 N. J. Eq. 415; *Chapman v. City of Rochester*, 110 N. Y. 273, 18 N. E. 88, 1 L. R. A. 296, 6 Am. St. Rep. 366.

⁶ *Bishop v. Banks*, 33 Conn. 118, 87 Am. Dec. 197; *Davis v. Sawyer*, 133 Mass. 289, 43 Am. Rep. 519, note; *Gilbough v. West Side Amusement Co.*, 64 N. J. Eq. 27, 53 Atl. 289.

⁷ *Tuebner v. California St. R. Co.*, 66 Cal. 171, 4 Pac. 1162; *McKeon v. See*, 51 N. Y. 300, 10 Am. Rep. 659; *Blomen v. N. Barstow Co.*, 35 R. I. 198, 85 Atl. 924, 44 L. R. A. (N. S.) 236.

⁸ *Hamilton v. Whitridge*, 11 Md. 129, 69 Am. Dec. 184; *Selfert v. Dillon*, 83 Neb. 322, 119 N. W. 686, 19 L. R. A. (N. S.) 1018, 131 Am. St. Rep. 642, 17 Ann. Cas. 1126; *Ingersoll v. Rousseau*, 35 Wash. 92, 76 Pac. 513, 1 Ann. Cas. 35.

⁹ *Pennsylvania R. Co. v. Kelley*, 77 N. J. Eq. 129, 75 Atl. 758, 140 Am. St. Rep. 541; *Simmons v. Everson*, 124 N. Y. 319, 26 N. E. 911, 21 Am. St. Rep. 676, 36 N. Y. St. Rep. 265; *Keeler v. Lederer Realty Corp.*, 26 R. I. 524, 59 Atl. 855; *Mayor, etc., of London v. Bolt*, 5 Ves. Jr. 129.

¹⁰ *Speckmann v. Krelg*, 79 Mo. App. 376; *Muller v. McKesson*, 73 N. Y. 195, 29 Am. Rep. 123; *Brown v. Carpenter*, 26 Vt. 638, 62 Am. Dec. 603.

¹¹ *City of Waterloo v. Waterloo, C. F & N. Ry. Co.*, 149 Iowa, 129, 125 N. W. 819.

¹² *Perry v. People's Gas Light & Coke Co.*, 119 Ill. App. 389; *City of Valparaiso v. Bozarth*, 153 Ind. 536, 55 N. E. 439, 47 L. R. A. 487; *Tinker v. New York, O. & W. Ry. Co.*, 157 N. Y. 312, 51 N. E. 1031.

or magazine contiguous to the buildings of others, and on that ground may be answerable for all damage due to an explosion.¹³ But he may also be liable for trespass if the débris is cast upon adjoining premises.¹⁴ Put another way, a nuisance "is, properly speaking, something which works harm while *in integro*; that is, in the condition in which the defendant has put or left it."¹⁵ The powder manufactory was a nuisance before it exploded. If it had not been maintained under such circumstances as to constitute a nuisance,¹⁶ the explosion would not have made it one. Nuisance and trespass, however, are alike, in that liability is incurred without regard to the care exercised by the wrongdoer, and in that respect they differ from negligence.¹⁷ Nor, ordinarily, is motive considered in nuisance, just as it is not essential in trespass; but this is not invariably so. Loud and continuous noise may be a nuisance, if made maliciously and with the design of causing annoyance; whereas it would not be actionable if made at not unreasonable hours, in the course of constructing a building or carrying on a lawful occupation with due care. So, members of a family may, while at home, talk, sing, and dance, even loudly, open and close doors, and allow the doors to remain open while food is being cooked. "But they have no right wantonly and needlessly to do any or all these things in an unusual manner, for the mere purpose of annoying and rendering uncomfortable their neighbors."¹⁸

¹³ Chicago, W. & V. Coal Co. v. Glass, 34 Ill. App. 364; McAndrews v. Collierd, 42 N. J. Law, 189, 36 Am. Rep. 508; HEEG v. LICHT, 80 N. Y. 579, 8 Abb. N. C. 355, 36 Am. Rep. 654, Chapln Cas. Torts, 377; Wilson v. Phoenix Powder Mfg. Co., 40 W. Va. 413, 21 S. E. 1035, 52 Am. St. Rep. 890.

¹⁴ See *supra*, p. 346.

¹⁵ Jaggard on Torts, vol. II, p. 747.

¹⁶ E. g., on an open prairie.

¹⁷ Nuisance: City of Burlington v. Stockwell (1897) 5 Kan. App. 569, 47 Pac. 988; Susquehanna Fertilizer Co. v. Spangler, 86 Md. 562, 39 Atl. 270, 63 Am. St. Rep. 533; McAndrews v. Collierd, 42 N. J. Law, 189, 36 Am. Rep. 508; Rosenheimer v. Standard Gas Light Co., 36 App. Div. 1, 55 N. Y. Supp. 192.

¹⁸ Medford v. Levy, 31 W. Va. 649, 656, 8 S. E. 302, 2 L. R. A. 368, 13 Am. St. Rep. 887.

PUBLIC AND PRIVATE NUISANCES

115. Nuisances are public or private. The difference is to be found in the nature of the right infringed. If vested in the individual as such, the nuisance is private. If collectively enjoyed by members of the community to which the correlative duty is owing, it is public.¹⁹

A public nuisance is a crime against the body politic which may lead to criminal prosecution;²⁰ but the same state of facts may give rise to a cause of action in favor of an individual. To have this effect, however, the aggrieved party, it is said, must have suffered an injury peculiar to himself, differing in kind, and not merely in degree, from that suffered by the community at large. Thus, a saloon, illegally kept, may constitute a public nuisance; but, if so, it will not be deemed private as to any individual, so as to confer upon him a cause of action, merely because his relatives or employes are accustomed to frequent it, to his and their detriment.²¹ On the other hand, the obstruction

¹⁹ See *Aldrich v. Wetmore*, 52 Minn. 164, 53 N. W. 1072; *King v. Morris & E. R. Co.*, 18 N. J. Eq. 397. A purpresture is not necessarily a public nuisance. It "may be defined as an inclosure by a private party of a part of that which belongs to and ought to be open and free to the enjoyment of the public at large. The appropriation by an individual of a part of a public common may therefore be a purpresture. * * * An unauthorized inclosure of a part of a highway may also be a purpresture." The difference is that "a public nuisance must be something which subjects the public to some degree of inconvenience or annoyance; but a purpresture may exist without putting the public to any inconvenience whatever. Such might be the case where the part of a common highway is inclosed, provided the appropriation is confined to a part never made use of for purposes to which the highway is devoted." *Attorney General ex rel. Muskegon Booming Co. v. Evart Booming Co.*, 34 Mich. 462, 472, per Cooley, C. J.

²⁰ E. g., *Burns' Ann. St. Ind.* 1914, §§ 2440, 2441; *Rev. Laws Mass.* 1902, c. 101, §§ 1-12; *Penal Law N. Y.* (Consol. Laws, c. 40) §§ 1530-1533.

²¹ *Brown v. Perkins*, 12 Gray (Mass.) 89; *Northern Pac. R. Co. v.*

of a public highway, though a public nuisance, may give rise to a cause of action in favor of an innkeeper, where travel has thereby been diverted and his business seriously interrupted.²² So the obstruction of a navigable stream is a private nuisance as to the owner and operator of a saw-mill, who receives and ships lumber over the river from points above and below.²³ But, though the requirement that there be an injury distinct in kind applies in cases like the foregoing, where there has been an interference with such public rights as to the use of a highway or navigable stream, "there is another class of cases in which the essence of the wrong consists in an invasion of private right, and in which the public offense is committed, not merely by doing an act which causes injury, annoyance, and discomfort to one or several persons who may come within the sphere of its operation or influence, but by doing it in such place and in such manner that the aggregation of private injuries becomes so great and extensive as to constitute a public annoyance and inconvenience and a wrong against the community, which may be properly the subject of a public prosecution. But it has never been held, so far as we know," said the Supreme Court of Massachusetts,²⁴ "that in cases of this character the injury to private property, or to the health and comfort of individuals, becomes merged in the public wrong, so as to take away

Whalen, 149 U. S. 157, 13 Sup. Ct. 822, 37 L. Ed. 686. Cf. the following, where the rights violated were deemed exclusively public: *School District v. Neil*, 36 Kan. 617, 14 Pac. 253, 59 Am. Rep. 575; *Whitmore v. Brown*, 102 Me. 47, 65 Atl. 516, 9 L. R. A. (N. S.) 868, 120 Am. St. Rep. 454; *Shaubut v. St. Paul & S. C. R. Co.*, 21 Minn. 502.

²² *Buchholz v. New York, L. E. & W. R. Co.*, 148 N. Y. 640, 43 N. E. 76. In accord, *O'Brien v. Central Iron & Steel Co.*, 158 Ind. 218, 63 N. E. 302, 57 L. R. A. 508, 92 Am. St. Rep. 305; *Platt & Spelth v. Chicago, B. & Q. Ry. Co.*, 74 Iowa, 127, 37 N. W. 107; *Aldrich v. Wetmore*, 52 Minn. 164, 53 N. W. 1072.

²³ *Pedrick v. Raleigh & P. S. R. Co.*, 143 N. C. 485, 55 S. E. 877, 10 L. R. A. (N. S.) 554. In accord, *Dudley v. Kennedy*, 63 Me. 465. So as to the pollution of a water course. *Nolan v. City of New Britain*, 69 Conn. 668, 38 Atl. 703.

²⁴ *WESSON v. WASHBURN IRON CO.*, 95 Mass. (13 Allen) 95, 102-103, 90 Am. Dec. 181, Chapin Cas. Torts, 373.

from the persons injured the right which they would otherwise have to maintain actions to recover damages which each may have sustained in his person or estate from the wrongful act." Hence stagnant and malaria generating ponds, artificially created, are not solely a public nuisance. They are likewise private as to an adjoining property owner.²⁵ So the fact that noxious odors²⁶ or loud noise²⁷ may cause injury to a large number of persons will not bar an action by one, whether the nuisance be public or private.

Can there be a recovery by one who shows no possessory or proprietary right in himself in the land affected, even though in the case of a public nuisance his damage is special and peculiar? Take, for instance, a lodger or member of the household, who suffers discomfort or is made ill by noxious fumes. Though it has been asserted that he has no cause of action,²⁸ it is submitted that this ruling is open to serious objection,²⁹ and that the courts which have adopted the opposite doctrine have logic on their side.³⁰ The conflict of opinion has apparently arisen "from confus-

²⁵ *Richards v. Daugherty*, 173 Ala. 569, 31 South. 934.

²⁶ *Lind v. City of San Luis Obispo*, 109 Cal. 340, 42 Pac. 437; *Roessler & Hasslacher Chemical Co. v. Doyle*, 73 N. J. Law, 521, 64 Atl. 156; *Francis v. Schoellkopf*, 53 N. Y. 152.

²⁷ *Kissel v. Lewis*, 156 Ind. 233, 59 N. E. 478; *Gilbough v. West Side Amusement Co.*, 64 N. J. Eq. 27, 53 Atl. 289.

²⁸ *Kavanagh v. Barber*, 131 N. Y. 211, 30 N. E. 235, 15 L. R. A. 689.

²⁹ It is difficult to reconcile *Kavanagh v. Barber* with cases where recovery was allowed for injuries received by one having no property interest, due to obstructions in the street, bulging walls, etc. See *Simmons v. Everson*, 124 N. Y. 319, 26 N. E. 911, 21 Am. St. Rep. 676; *Cohen v. Mayor, etc., of New York*, 113 N. Y. 532, 21 N. E. 700, 4 L. R. A. 406, 10 Am. St. Rep. 506, 23 N. Y. St. Rep. 509; *Congreve v. Smith*, 18 N. Y. 79. Suppose death had been caused by the emission of deadly fumes? It is submitted that recovery might be had as for a nuisance, whether the deceased were passing on the highway or residing as a boarder on adjoining property. It is somewhat peculiar that later on the New York Court of Appeals referred to *Kavanagh v. Barber* as if it had sustained the doctrine that in this respect there was no difference between nuisance and trespass. *Hughes v. City of Auburn*, 161 N. Y. 96, 105, 55 N. E. 389, 46 L. R. A. 636.

³⁰ *Hosmee v. Republic Iron & Steel Co.*, 179 Ala. 415, 60 South. 801, 43 L. R. A. (N. S.) 871; *Towaliga Falls Power Co. v. Sims*, 6 Ga. App. 749, 65 S. E. 844 (under Code); *Ft. Worth & R. G. Ry. Co. v.*

ing the damage which results to property from a nuisance with that special damage, such as sickness, which may result to an individual from a nuisance, either public or private.”⁸¹

“It is not necessary to a right of action that the owner should be driven from his dwelling; it is enough that the enjoyment of life and property be rendered uncomfortable.”⁸² But where an act is asserted to be a nuisance, because of the illness or discomfort which it produces, there must be considered the effect upon an ordinary man, and not upon those whose mental or physical condition makes them peculiarly sensitive.⁸³ Thus, although the business of an undertaker may be carried on in such a manner as to constitute a nuisance, it will not be restrained merely because the occupant of an adjoining dwelling has an extraordinary repugnance to contemplating anything pertaining to death. “The law does not contemplate rules for the protection of every individual wish or desire or taste. It is not within the judicial scheme to make things pleasant or agreeable for all the citizens of the state.”⁸⁴ On the other hand, “whatever is offensive physically to the senses, and by such offensiveness makes life uncomfortable, is a nuisance; and it is none the less so because there may be persons whose habits and occupations have brought them to endure the same annoyances without discomfort.”⁸⁵

Glenn, 97 Tex. 586, 80 S. W. 992, 65 L. R. A. 818, 104 Am. St. Rep. 894, 1 Ann. Cas. 270.

⁸¹ Ft. Worth & R. G. Ry. Co. v. Glenn, *supra*, 97 Tex. 590, 80 S. W. 992, 65 L. R. A. 818, 104 Am. St. Rep. 894, 1 Ann. Cas. 270, per Gaines, C. J.

⁸² Bohan v. Port Jervis Gaslight Co., 122 N. Y. 18, 23, 25 N. E. 249, 9 L. R. A. 711, per Brown, J.

⁸³ Rogers v. Elliott, 146 Mass. 349, 15 N. E. 768, 4 Am. St. Rep. 316; Butterfield v. Klaber, 52 How. Prac. (N. Y.) 255; Lord v. De Witt (C. C.) 116 Fed. 713. Cf. First Ave. Coal & Lumber Co. v. Johnson, 171 Ala. 470, 54 South. 598, 32 L. R. A. (N. S.) 522; Price v. Grantz, 118 Pa. 402, 11 Atl. 794, 4 Am. St. Rep. 601; McCann v. Strang, 97 Wis. 551, 72 N. W. 1117.

⁸⁴ Westcott v. Middleton, 43 N. J. Eq. 478, 483, 11 Atl. 490, per Bird, V. C.

⁸⁵ Cleveland v. Citizens' Gaslight Co., 20 N. J. Eq. 201, 206. In accord, Davis v. Sawyer, 133 Mass. 289, 43 Am. Rep. 519n.

NUISANCES *PER SE* AND *PER ACCIDENS*

116. Certain things are regarded as nuisances *per se*, being unlawful at all times and under all circumstances, but generally the nuisance is within the class denominated *per accidens*, by which is meant that the unlawfulness of the act is determined by accompanying conditions.

Illustrations of a nuisance *per se* would be a house of assignation or the obstruction of a highway or a navigable stream.⁸⁶

There has been some divergence of views as to whether an act or business lawful in itself can as *matter of law* be held to constitute a nuisance because of surrounding circumstances or the manner in which it is done or conducted.⁸⁷ It is enough here merely to note that "certain kinds of business or structures, as powder houses or nitroglycerine works, are so dangerous to human life that they may be maintained only in the most remote and secluded localities. Others, as slaughter houses and certain foul-smelling factories, are so offensive to the senses that they must be removed from the limits of cities and towns, and even from the near neighborhood of family residences. Yet there must be some proper place where every lawful business may be carried on, without danger of interference on the part of those who, in some slight degree, may be annoyed or endangered by the nearness of the objectionable occupation."⁸⁸ Therefore in the case of nuisances *per accidens*

⁸⁶ *Hundley v. Harrison*, 123 Ala. 292, 296, 26 South. 294; *Windfall Mfg. Co. v. Patterson*, 148 Ind. 414, 420, 47 N. E. 2, 37 L. R. A. 381, 62 Am. St. Rep. 532.

⁸⁷ See *Melker v. City of New York*, 190 N. Y. 481, 488, 83 N. E. 565, 16 L. R. A. (N. S.) 621, 13 Ann. Cas. 544.

⁸⁸ *Windfall Mfg. Co. v. Patterson*, 148 Ind. 414, 421, 47 N. E. 2, 37 L. R. A. 381, 62 Am. St. Rep. 532, per Howard, J. In accord, *Swalm v. Morris*, 93 Ark. 362, 125 S. W. 432, 20 Ann. Cas. 930 (cotton gin); *Whitney v. Bartholomew*, 21 Conn. 213 (carriage factory and blacksmith's shop); *Bielman v. Chicago, St. P. & K. C. Ry. Co.*, 50 Mo. App. 151 (stock pens); *Lounsbury v. Foss*, 80 Hun, 296, 30 N. Y. Supp. 89, affirmed 145 N. Y. 600, 40 N. E. 164 (manufactory of ex-

the question of liability must largely resolve itself into one of reasonableness or unreasonableness in the use of property.³⁹

Thus it may become necessary to balance conflicting rights.⁴⁰

Where an action is brought on the ground that the thing alleged to be a nuisance is productive of personal inconvenience and discomfort, it not being shown that there was sensible injury to the property itself, the question "must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurs. If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade, which may be carried on in his immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town and of the public at large."⁴¹ On the other hand, if he choose to establish himself in the country, he cannot complain of many things incident to rural life, for instance, a neighbor's hen house, though there

plosives); *HEEG v. LICHT*, 80 N. Y. 579, 36 Am. Rep. 654, Chapin Cas. Torts, 377 (powder magazine); *Rodenhausen v. Craven*, 141 Pa. 546, 21 Atl. 774, 23 Am. St. Rep. 306 (carpet cleaning works).

³⁹ *Gus Blass Dry Goods Co. v. Reinman & Wolfert* (1912) 102 Ark. 287, 143 S. W. 1087; *Phillips v. Lawrence Vitrified Brick & Tile Co.*, 72 Kan. 643, 82 Pac. 787, 2 L. R. A. (N. S.) 92; *Ladd v. Granite State Brick Co.*, 68 N. H. 185, 37 Atl. 1041; *Campbell v. Seaman*, 63 N. Y. 568, 20 Am. Rep. 567. See *supra*, p. 513 et seq.

⁴⁰ "In the enjoyment of his own land, one must be confined to such reasonable use thereof as will not inflict injury upon his neighbor, or interfere with his neighbor's reasonable enjoyment, and must submit to such inconveniences as necessarily result from the reasonable use and enjoyment by his neighbor of land belonging to him." *Butterfield v. Klaber*, 52 How. Prac. [N. Y.] 255, 266, per Sandford, J.

⁴¹ *St. Helen's Smelting Co. v. Tipping*, 11 H. L. Cas. 642, 650, per Lord Westbury, Ch. In accord, *McGill v. Pintsch Compressing Co.*, 140 Iowa, 429, 118 N. W. 786, 20 L. R. A. (N. S.) 466; *Gallagher v. Flury*, 99 Md. 181, 57 Atl. 672; *Gilbert v. Showerman*, 23 Mich. 448; *Van De Vere v. Kansas City*, 107 Mo. 83, 17 S. W. 695, 28 Am. St. Rep. 396; *Huckenstine's Appeal*, 70 Pa. 102, 10 Am. Rep. 669, note. But cf. *Eller v. Koehler*, 68 Ohio St. 51, 56, 67 N. E. 89, where it was said that the rule was applicable, "whether it be a case of injury to real property or a case of personal annoyance or inconvenience, or of interference with the comfortable enjoyment of one's property."

arises therefrom at times "the characteristic cry made by its occupants."⁴² But "it is not appropriate to say that the injurious work is fitly and rightly located, and that the business is lawful in itself, when the ground of complaint is that it causes a real and serious direct injury to the property of another. However lawful the business may be in itself, and however suitable in the abstract the location may be, they cannot avail to authorize the conductor of the business to continue it in a way which directly, palpably, and substantially damages the property of others."⁴³ Nor can the principle be invoked to protect a business which produces discomfort wholly different from that which arises out of the ordinary use of property in that locality.⁴⁴

The character of a neighborhood may change. On the one hand, where a street "ceases to be used or occupied as a place of residence, and is changed into a place of business, no one or two persons, who may for any reason desire to continue a residence there, or shall persist in continuing to reside therein, should be allowed to prevent the carrying on of a lawful and useful trade merely because they are or may be subjected to annoyance or even loss thereby."⁴⁵ On the other, one cannot secure the right to carry on a trade or business nuisance merely because the location may originally have been a fit and proper one. What was not at first a nuisance may become such by the development and improvement of the locality. "Carrying on an offensive trade for any number of years in a place remote from

⁴² *Wade v. Miller*, 188 Mass. 6, 73 N. E. 849, 69 L. R. A. 820.

⁴³ *Robinson v. Baugh*, 31 Mich. 290, 296, per Graves, C. J. In accord, *St. Helen's Smelting Co. v. Tipping*, supra. Cf. *Susquehanna Fertilizer Co. v. Malone*, 73 Md. 268, 20 Atl. 900, 9 L. R. A. 737, 25 Am. St. Rep. 595.

⁴⁴ Thus the fact that the locality is used for purposes of trade and business will not justify the maintenance of a pottery which emits dense smoke and cinders, rendering the dwellings there uncomfortable. *Ross v. Butler*, 19 N. J. Eq. 294, 97 Am. Dec. 654.

⁴⁵ *Doellner v. Tynan*, 38 How. Prac. [N. Y.] 176, 186, per Monell, J. Cf. *Riedeman v. Mt. Morris Elec. Light Co.*, 56 App. Div. 23, 67 N. Y. Supp. 391, intimating that, although an injunction would be denied, relief might be had in law.

buildings and public roads does not entitle the owner to continue it in the same place, after houses have been built and roads laid out in the neighborhood, to the occupants of which and travelers upon which it is a nuisance. As the city extends, such nuisances should be removed to the vacant grounds beyond the immediate neighborhood of the residences of the citizens. This, public policy, as well as the health and comfort of the population of the city, demand." ⁴⁶ Hence plaintiff will not be denied relief merely because he located on premises adjoining the nuisance while the latter was in operation.⁴⁷

Parties Liable

The creator of the nuisance is responsible, whether it be upon his own or another's land.⁴⁸ If the premises are his own, he cannot escape liability by conveying them to another. It has been held that he may be responsible for damages thereafter accruing.⁴⁹ But by some courts this has been limited to cases where by the terms of the conveyance he can fairly be said to affirm or uphold the nuisance,⁵⁰ as where he conveys with covenant of quiet enjoyment and the right to continue the unlawful use of the land.⁵¹ The lessor may be held, where he "demised the premises with

⁴⁶ *Wier's Appeal*, 74 Pa. 230, 241, per Sharswood, J. In accord, *Com. v. Upton*, 6 Gray (Mass.) 473; *People v. Detroit White Lead Works*, 82 Mich. 471, 46 N. W. 735, 9 L. R. A. 722; *Board of Health of North Brunswick Tp. v. Lederer*, 52 N. J. Eq. 675, 29 Atl. 444.

⁴⁷ *Hurlbut v. McKone*, 55 Conn. 31, 10 Atl. 164, 3 Am. St. Rep. 17; *Bushnell v. Robeson*, 62 Iowa, 540, 17 N. W. 888; *Campbell v. Seaman*, 63 N. Y. 568, 20 Am. Rep. 567.

⁴⁸ *Ackerman v. Ellis*, 81 N. J. Law, 1, 79 Atl. 883; *Smith v. Elliott*, 9 Pa. 345; *Thompson v. Gibson*, 7 M. & W. 456. Cf. *Anderson v. Dickle*, 28 How. Prac. (N. Y.) 105.

⁴⁹ *Plumer v. Harper*, 3 N. H. 88, 14 Am. Dec. 833. Cf. *Jordan v. Helwig*, 1 Wils. (Ind.) 447.

⁵⁰ See Wood on Nuisances (3d Ed.) vol. 1, p. 101.

⁵¹ *East Jersey Water Co. v. Bigelow*, 60 N. J. Law, 201, 38 Atl. 631; *Waggoner v. Jermaine*, 3 Denio (N. Y.) 306, 45 Am. Dec. 474. A warranty of title is not sufficient. It must be a warranty of the continued enjoyment of the nuisance or of what creates the nuisance. *Hanse v. Cowing*, 1 Lans. (N. Y.) 288. Cf. *Lohmiller v. Indian Ford Water Power Co.*, 51 Wis. 683, 8 N. W. 601.

the nuisance upon them, and at the time of the damage resulting therefrom is receiving a benefit therefrom by way of rent or otherwise,"⁵² where he has leased the premises to be used in the illegal manner,⁵³ or the nuisance necessarily arises out of the ordinary use of the premises as they were when the tenant took possession.⁵⁴ Where, however, the nuisance is the result of the negligence of the tenant, or of an improper use not contemplated or sanctioned by the landlord, the latter is not responsible.⁵⁵ Possibly it is otherwise if the nuisance is due to a lack of repairs which the landlord has agreed to make, for here, it has been said, in case of a recovery against the tenant, the latter would have his remedy over; so to avoid circuitry of action the injured party may proceed in the first instance against the landlord.⁵⁶ On the other hand, where one comes into pos-

⁵² *Swords v. Edgar*, 59 N. Y. 28, 34, 17 Am. Rep. 295. Cf. *Grady v. Wolsner*, 46 Ala. 381, 7 Am. Rep. 593; *Pierce v. German Savings & Loan Soc.*, 72 Cal. 180, 13 Pac. 478, 1 Am. St. Rep. 45; *Longley v. McGeoch*, 115 Md. 182, 80 Atl. 843; *King v. Pedley*, 1 Adol. & El. 822. The lessor is not exonerated because the lessee has covenanted to repair when the nuisance was in existence at the time of the demise. *Isham v. Broderick*, 89 Minn. 397, 95 N. W. 224; *Ingwersen v. Rankin*, 47 N. J. Law, 18, 54 Am. Rep. 109; *Swords v. Edgar*, 59 N. Y. 28, 17 Am. Rep. 295. But see *Cerchione v. Hunnewell*, 215 Mass. 588, 102 N. E. 908, 50 L. R. A. (N. S.) 300.

⁵³ *Jordan v. Helwig*, Wils. (Ind.) 447; *Fish v. Dodge*, 4 Denio (N. Y.) 311, 47 Am. Dec. 254; *Marsan v. French*, 61 Tex. 173, 48 Am. Rep. 272.

⁵⁴ *Pickard v. Collins*, 23 Barb. (N. Y.) 444; *Fow v. Roberts*, 108 Pa. 489; *Terminal Co. v. Jacobs*, 109 Tenn. 727, 72 S. W. 954, 61 L. R. A. 188.

⁵⁵ *Joseph Schlitz Brewing Co. v. Shiel* (1909) 45 Ind. App. 623, 88 N. E. 957; *Harris v. Cohen*, 50 Mich. 324, 15 N. W. 493; *Washington v. Episcopal Church of St. Peter's*, 111 App. Div. 402, 97 N. Y. Supp. 1072; *Fleischner v. Citizens' Real Estate & Investment Co.*, 25 Or. 119, 35 Pac. 174. See *Ahern v. Steele*, 115 N. Y. 203, 22 N. E. 193, 5 L. R. A. 449, 12 Am. St. Rep. 778.

⁵⁶ See *Jessen v. Swelgert*, 66 Cal. 182, 4 Pac. 1188; *Gridley v. City of Bloomington*, 68 Ill. 47 (no agreement shown); *City of Lowell v. Spaulding*, 4 Cush. (Mass.) 277, 50 Am. Dec. 775, note. *Glidden v. Goodfellow*, 124 Minn. 101, 144 N. W. 428; *Clancy v. Byrne*, 56 N. Y. 129, 15 Am. Rep. 391n; *Ahern v. Steele*, 115 N. Y. 203, 22 N. E. 193, 5 L. R. A. 449, 12 Am. St. Rep. 778. Cf. *Reynolds v. Van Beuren*,

session of land as grantee,⁵⁷ devisee,⁵⁸ tenant,⁵⁹ or otherwise, on which there is an existing nuisance, and he merely permits it to remain, he is not responsible until a reasonable time has elapsed after notice and request to remove or abate, and refusal or neglect so to do.⁶⁰ Liability is therefore properly predicated on creation or conscious maintenance, and not upon mere ownership or occupancy of the premises.⁶¹ It is said that, though the notice need not be in any particular form, and may be written, oral, or by acts,⁶² it must be unequivocal in tenor,⁶³ and that mere knowledge is insufficient, since the plaintiff must be deemed to have acquiesced until he requests an abatement or removal.⁶⁴ Still the object of the rule is to prevent hardship to one who presumably is an innocent party, and it would

155 N. Y. 120, 49 N. E. 763, 42 L. R. A. 129; *Perez v. Rabaud*, 76 Tex. 191, 13 S. W. 177, 7 L. R. A. 620. See, also, 92 Am. St. Rep. 504, note, for collection of authorities.

⁵⁷*Crommelin v. Cox & Co.*, 30 Ala. 318, 68 Am. Dec. 120; *Johnson v. Lewis*, 13 Conn. 303, 33 Am. Dec. 405; *Pillsbury v. Moore*, 44 Me. 154, 69 Am. Dec. 91; *Rychlicki v. City of St. Louis*, 115 Mo. 662, 22 S. W. 908; *Conhocton Stone Road v. Buffalo, N. Y. & E. R. Co.*, 51 N. Y. 573, 10 Am. Rep. 646 ("notice or knowledge.")

⁵⁸*Ahern v. Steele*, 115 N. Y. 203, 22 N. E. 193, 5 L. R. A. 449, 12 Am. St. Rep. 778.

⁵⁹*McDonough v. Gilman*, 85 Mass. (3 Allen) 264, 80 Am. Dec. 72; *De Laney v. Georgia, C. & N. Ry. Co.*, 58 S. C. 357, 36 S. E. 699, 79 Am. St. Rep. 843; *Slight v. Gutzlaff*, 35 Wis. 675, 17 Am. Rep. 476.

⁶⁰Notice is only necessary when the nuisance existed before the person sought to be charged became owner or tenant. *Finkelstein v. Huner*, 77 App. Div. 424, 79 N. Y. Supp. 334, affirmed 179 N. Y. 548, 71 N. E. 1130.

⁶¹Cf. *Brown v. McAllister*, 39 Cal. 573; *Brimberry v. Savannah, F. & W. Ry. Co.*, 78 Ga. 641, 3 S. E. 274; *Wolf v. Kilpatrick*, 101 N. Y. 146, 4 N. E. 188, 54 Am. Rep. 672; *Schmidt v. Cook*, 4 Misc. Rep. 85, 23 N. Y. Supp. 799, 53 N. Y. St. Rep. 84; *Grant v. Louisville & N. Ry. Co.*, 129 Tenn. 398, 165 S. W. 963.

⁶²*Carleton v. Redington*, 21 N. H. 291, 311; *Bishop v. Readsboro Chair Mfg. Co.*, 85 Vt. 141, 150, 81 Atl. 454, 36 L. R. A. (N. S.) 1171, Ann. Cas. 1914B, 1163.

⁶³*McDonough v. Gilman*, 3 Allen (Mass.) 264, 80 Am. Dec. 72.

⁶⁴*West & Bro. v. Louisville, C. & L. R. Co.*, 8 Bush. (Ky.) 404. In *Philadelphia & R. R. Co. v. Smith*, 64 Fed. 679, 682, 12 C. C. A. 384, 27 L. R. A. 131, the point was considered, but not decided.

seem that knowledge brought home to the latter should be sufficient.⁶⁵ But "cases which hold that a defendant may be held liable for the continuance of a nuisance, erected by another on his land, without any request or notice to him to remove the same, will generally be found upon examination to be cases where there has been, on the part of such defendant, some active participation in the continuance of the nuisance,⁶⁶ or some positive act evidencing its adoption,⁶⁷ or some use⁶⁸ of the structure complained of as a nuisance, like the operation of a factory which emits injurious and unwholesome smells. In the latter case, every act of using is a new nuisance."⁶⁹ It will not be enough, however, that the defendant, before notice, has made repairs, where he did not thereby make the thing any more a nuisance than otherwise it would have been.⁷⁰

⁶⁵ *Willitts v. Chicago, B. & K. C. Ry. Co.*, 88 Iowa, 281, 55 N. W. 313, 21 L. R. A. 608; *Martin v. Chicago, R. I. & P. Ry. Co.*, 81 Kan. 344, 105 Pac. 451, 27 L. R. A. (N. S.) 164. Cf. *Conhocton Stone Road v. Buffalo, N. Y. & E. R. Co.*, 51 N. Y. 573, 10 Am. Rep. 646.

⁶⁶ *Steinke v. Bentley*, 6 Ind. App. 663, 34 N. E. 97. Notice is not required where the injury has been produced by changes made by defendant himself in the character of the nuisance. *Middlebrooks v. Mayne*, 96 Ga. 449, 23 S. E. 398.

⁶⁷ See *Dukes v. Eastern Distilling Co.*, 51 Hun, 605, 4 N. Y. Supp. 562, affirmed 123 N. Y. 652, 25 N. E. 954, 33 N. Y. St. Rep. 1029.

⁶⁸ *Central Consumers Co. v. Pinkert*, 92 S. W. 957, 29 Ky. Law Rep. 273; *Whitenack v. Philadelphia & R. R. Co. (C. C.)* 57 Fed. 901. See *Beckley v. Skroh*, 19 Mo. App. 75; *Morris Canal & Banking Co. v. Ryerson*, 27 N. J. Law, 457; *Wasmer v. Delaware, L. & W. R. Co.*, 80 N. Y. 212, 36 Am. Rep. 608; *Wenzlick v. McCotter*, 87 N. Y. 122, 41 Am. Rep. 358.

⁶⁹ *Groff v. Ankenbrandt*, 124 Ill. 51, 55, 15 N. E. 40, 7 Am. St. Rep. 342.

⁷⁰ *McDonough v. Gilman*, 3 Allen (Mass.) 264, 80 Am. Dec. 72; *Philadelphia & R. R. Co. v. Smith*, 64 Fed. 679, 12 C. C. A. 384, 27 L. R. A. 131. Cf. *Grigsby v. Clear Lake Water Works Co.*, 40 Cal. 396; *Curtice v. Thompson*, 19 N. H. 471.

REMEDIES

117. The injured party may himself in certain cases abate the nuisance. He may also recover damages in an action at law, or he may seek relief in equity.

If the nuisance is public, the offender may be prosecuted criminally; but with this we have nothing to do. In some cases, the injured party may himself act, or he may sue at law or in equity. In a sense, the right to abate a nuisance is not self-redress, since it is not given for the purpose of obtaining compensation, but to prevent an anticipated injury. Hence the fact that a nuisance has previously been abated will not prevent the abator from bringing an action to recover for damages suffered prior to the abatement.⁷¹

Abatement consists in the removal of the nuisance by the party aggrieved.⁷² The thing, when abated, must have been a nuisance, as it is not enough that it was such in the past, or was likely to become one again.⁷³ The rule "is that an individual citizen may abate a private nuisance injurious to him, where he could also bring an action,"⁷⁴ and also, when a common nuisance obstructs his individual right, he may remove it to enable him to enjoy that right,⁷⁵ and he cannot be called in question for so doing."⁷⁶ Thus, where a

⁷¹ *Pierce v. Dart*, 7 Cow. (N. Y.) 609.

⁷² Blackstone Comm. book III, p. 5.

⁷³ *Gates v. Blincoe*, 2 Dana (Ky.) 158, 26 Am. Dec. 440.

⁷⁴ *Buck v. McIntosh*, 140 Ill. App. 9 (cutting embankment); *State v. Moffett*, 1 G. Greene (Iowa) 247 (cutting dam); *Hickey v. Mich. Cent. R. Co.*, 96 Mich. 498, 55 N. W. 989, 21 L. R. A. 729, 35 Am. St. Rep. 621 (cutting overhanging branches); *Brill v. Flagler*, 23 Wend. (N. Y.) 354 (killing dog which habitually howled about defendant's dwelling).

⁷⁵ *Inhabitants of Marlon v. Tuell*, 111 Me. 566, 90 Atl. 484, 51 L. R. A. (N. S.) 1172; *Brown v. De Groff*, 50 N. J. Law, 409, 14 Atl. 219, 7 Am. St. Rep. 794; *State v. Parrott*, 71 N. O. 311, 17 Am. Rep. 5. Thus a traveler along a public highway may remove an unlawful obstruction to his passage. *Corthell v. Holmes*, 88 Me. 376, 34 Atl. 173; *Wales v. Stetson*, 2 Mass. 143, 3 Am. Dec. 39; *James v. Hayward*, Cro. Car. 184.

⁷⁶ *Brown v. Perkins*, 12 Gray (Mass.) 89, 101, per Shaw, C. J.

boat house was built in a river at the foot of a public street and barred the ingress and egress of an adjoining landowner, the latter is justified in tearing down the obstructing portion of the building.⁷⁷ But, on the other hand, one would have no right to tear down a building illegally constructed in navigable water in front of his villa lots, on the ground that it rendered them less convenient of access by water, where it did not appear that he had ever been prevented or deterred thereby from going to or from them in this manner.⁷⁸

The right of abatement is subject to certain limitations. It may not be exercised when it will bring about a breach of the peace, and therefore, if forcible resistance is offered, the injured party must apply to the courts.⁷⁹ Again, if the nuisance be upon another's land,⁸⁰ he must first be requested to remove it, unless, as was said in *Jones v. Williams*,⁸¹ he is himself its creator, or it arose from his default in the performance of a duty imposed by law, or it is imminently dangerous to life, health, or property.⁸² All unnecessary injury must be avoided,⁸³ and a distinction must be drawn between cases where the thing itself constitutes a nuisance and where the nuisance consists in the abuse. In the latter event, the illegal use only must be stopped, and not the thing itself destroyed. For instance, the destruction of a

⁷⁷ *People v. Severance*, 125 Mich. 556, 84 N. W. 1089.

⁷⁸ *Bowden v. Lewis*, 13 R. I. 189, 43 Am. Rep. 21 N. · See, also, the following, where the public nuisance was not private as to the abater: *Brown v. Perkins*, 12 Gray (Mass.) 89; *Clark v. Lake St. Clair & N. U. R. Ice Co.*, 24 Mich. 508; *Harrower v. Ritson*, 37 Barb. (N. Y.) 301; *Larson v. Furlong*, 50 Wis. 681, 8 N. W. 1.

⁷⁹ *Day v. Day*, 4 Md. 262; *State v. White*, 18 R. I. 473, 28 Atl. 968.

⁸⁰ Aliter, if it is not necessary for the abater to make entry; e. g., cutting overhanging branches. *Lemmon v. Webb*, 64 L. J. Ch. 205, 71 L. T. Rep. N. S. 647, 11 Rep. 116, 58 J. P. 546.

⁸¹ *JONES v. WILLIAMS*, 11 M. & W. 176, Chapin Cas. Torts, 381.

⁸² See *supra*, p. 568 et seq., as to necessity of notice before bringing action. Cf. *Buck v. McIntosh*, 140 Ill. App. 9; *Hickey v. Mich. Cent. R. Co.*, 96 Mich. 498, 55 N. W. 989, 21 L. R. A. 729, 35 Am. St. Rep. 621.

⁸³ *Moffett v. Brewer*, 1 G. Greene (Iowa) 348; *Gates v. Blincoe*, 2 Dana (Ky.) 158, 26 Am. Dec. 440; *Inhabitants of Marlon v. Tuell*,

building used as a house of assignation,⁸⁴ or for the illegal sale of intoxicating liquors,⁸⁵ is not necessary to its abatement.⁸⁶ But it would be otherwise where a house had become so filthy and infected that it was likely to breed disease.⁸⁷ Neither can an abator appropriate the materials of the structure to his own use.⁸⁸

The injured party may seek mere compensation in an action at law,⁸⁹ which originally was brought in case.⁹⁰

111 Me. 566, 90 Atl. 484, 51 L. R. A. (N. S.) 1172. Cf. *Barranco v. Birmingham Ry., Light & Power Co.* (1912) 178 Ala. 647, 59 South. 467.

⁸⁴ *Welch v. Stowell*, 2 Doug. (Mich.) 332; *Ely v. Board of Supervisors of Niagara County*, 36 N. Y. 297.

⁸⁵ *State v. Paul*, 5 R. I. 185.

⁸⁶ For further illustrations, see *City of Chicago v. Union Stock Yards & Transit Co.*, 164 Ill. 224, 45 N. E. 430, 35 L. R. A. 281; *Finley v. Hershey*, 41 Iowa, 389; *Brightman v. Inhabitants of Bristol*, 65 Me. 426, 20 Am. Rep. 711; *Miller v. Burch*, 32 Tex. 208, 5 Am. Rep. 242. "If a dye house or any stinking trade were indicted, you shall not pull down the house where the trade was carried on." *Rex v. Papineau*, 2 Str. 686, 688.

⁸⁷ *Meeker v. Van Rensselaer*, 15 Wend. (N. Y.) 397. In accord, *Nazworthy v. City of Sullivan*, 55 Ill. App. 48. Cf. *Harvey v. Dewoody*, 18 Ark. 252; *Fields v. Stokley*, 99 Pa. 306, 44 Am. Rep. 109, note: "When a person who is entitled to a limited right exercises it in excess, so as to produce a nuisance, it may be abated to the extent of the excess. But if the nuisance cannot be abated without obstructing the right altogether, the exercise of the right may be entirely stopped until means have been taken to reduce it within its proper limits." *Crosland v. Borough of Pottsville*, 126 Pa. 511, 522, 18 Atl. 15, 12 Am. St. Rep. 891.

⁸⁸ *Larson v. Furlong*, 50 Wis. 681, 8 N. W. 1. Cf. *City of Indianapolis v. Miller*, 27 Ind. 394; *Gates v. Blincoe*, 2 Dana (Ky.) 158, 26 Am. Dec. 440.

⁸⁹ Here it has been held that, if the injury is to the property and

⁹⁰ The ancient common-law remedies were two: "(1) *Quod permittat prosternere*. This was in the nature of a writ of right, and therefore subject to great delays. It commanded the defendant to permit the plaintiff to abate the nuisance or show cause against the same; and plaintiff could have judgment to abate the nuisance and for damages against the defendant. (2) An assize of nuisance, in which the sheriff was commanded to summon a jury to view the premises and, if they found for the plaintiff, he had judgment to have the nuisance abated and for damages." *Powell v. Bentley & Gerwig Furniture Co.*, 34 W. Va. 804, 808, 12 S. E. 1085, 12 L. R. A. 53, per Holt, J.

Where preventive relief is desired, he must apply to equity, which may direct the abatement of the nuisance,⁹¹ or restrain its continuance,⁹² and also award damages for injuries suffered.⁹³

It has been said that equitable interference is justified "on the ground of restraining irreparable mischief, or of suppressing interminable litigation, or of preventing multiplicity of suits."⁹⁴ This rests upon the established principle that equity will not act where the remedy at law is

"is of a permanent nature, the measure of damages would be the depreciation in the market value of the land (cf. *Risher v. Acken Coal Co.*, 147 Iowa, 459, 124 N. W. 764; *Central Consumers' Co. v. Pinkert*, 122 Ky. 720, 92 S. W. 957, 13 Ann. Cas. 105); but if the injury is not of a permanent character, then the diminution in the rental value or the depreciation in its use would be the measure of recovery." *Junction City Lumber Co. v. Sharp*, 92 Ark. 538, 544, 123 S. W. 370. In accord, *Ewing v. City of Louisville*, 140 Ky. 726, 131 S. W. 1016, 31 L. R. A. (N. S.) 612. Cf. *Shirely v. Cedar Rapids, L. F. & N. W. R. Co.*, 74 Iowa, 169, 37 N. W. 133, 7 Am. St. Rep. 471; *Francis v. Schoellkopf*, 53 N. Y. 152; *Herbert v. Rainey*, 162 Pa. 525, 29 Atl. 725. To this may be added damages for sickness, discomfort and impairment of health. *Ferguson v. Firmenich Mfg. Co.*, 77 Iowa, 576, 42 N. W. 448, 14 Am. St. Rep. 319; *Berger v. Minneapolis Gaslight Co.*, 60 Minn. 296, 62 N. W. 336; *Rosenheimer v. Standard Gaslight Co.*, 36 App. Div. 1, 55 N. Y. Supp. 192; *United States Smelting Co. v. Sisam*, 191 Fed. 293, 112 C. C. A. 37, 37 L. R. A. (N. S.) 976; also for expenses incurred by reason of his sickness. *Loughran v. City of Des Moines*, 72 Iowa, 382, 34 N. W. 172.

⁹¹ *Whaley v. Wilson*, 112 Ala. 627, 20 South. 922; *Carlisle v. Cooper*, 18 N. J. Eq. 241; *Van Bergen v. Van Bergen*, 2 Johns. Ch. (N. Y.) 272.

⁹² *Mayor & Council of City of Waycross v. Houk*, 113 Ga. 963, 39 S. E. 579; *Finkelstein v. Huner*, 77 App. Div. 424, 79 N. Y. Supp. 334, affirmed 179 N. Y. 548, 71 N. E. 1130; *Templeton v. Williams*, 59 Or. 160, 116 Pac. 1062, 35 L. R. A. (N. S.) 468; *Herring v. Wilton*, 106 Va. 171, 55 S. E. 546, 7 L. R. A. (N. S.) 349, 117 Am. St. Rep. 997, 10 Ann. Cas. 66; *Ingersoll v. Rousseau*, 35 Wash. 92, 76 Pac. 513, 1 Ann. Cas. 35.

⁹³ *Whaley v. Wilson*, 112 Ala. 627, 20 South. 922; *Cobb v. Massachusetts Chemical Co.*, 179 Mass. 423, 60 N. E. 790; *Finkelstein v. Huner*, 77 App. Div. 424, 79 N. Y. Supp. 334, affirmed 179 N. Y. 548, 71 N. E. 1130; *Whipple v. Village of Fair Haven*, 63 Vt. 221, 21 Atl. 533.

⁹⁴ *Carlisle v. Cooper*, 21 N. J. Eq. 576, 579, per Depue, J.

adequate.⁹⁵ By “irreparable mischief” or “injury” “is not meant such injury as is beyond the possibility of repair, or beyond possible compensation in damages, nor necessarily great injury, or great damage, but that species of injury, whether great or small, that ought not to be submitted to on the one hand, or inflicted on the other, and which, because it is so large on the one hand, or so small on the other, is of such constant and frequent recurrence that no fair or reasonable redress can be had therefor in a court of law.”⁹⁶ Hence equity will generally grant relief against a nuisance that is continuous or recurrent,⁹⁷ but rarely will it act against one which is merely temporary or casual.⁹⁸

Defenses

The defendant may plead legislative authority; i. e., that under a statute he is permitted to do an act which ordinarily is deemed unlawful. This is frequently referred to as the doctrine of “legalized nuisances”—an unfortunate expression, since one might as well speak of a “lawful crime.”

A distinction must here be noted between public and private rights. A Legislature may abrogate the former, and in England the latter, since Parliament is omnipotent.⁹⁹ But in America the rights of the individual are safeguarded

⁹⁵ *Dana v. Valentine*, 5 Metc. (Mass.) 8; *Zabriskie v. Jersey City & B. R. Co.*, 18 N. J. Eq. 314; *Galveston, H. & S. A. Ry. Co. v. De Groff*, 102 Tex. 433, 118 S. W. 134, 21 L. R. A. (N. S.) 749; *Denner v. Chicago, M. & St. P. Ry. Co.*, 57 Wis. 218, 15 N. W. 158.

⁹⁶ *Wood on Nuisance* (3d Ed.) § 778, quoted in *Wahle v. Reinbach*, 76 Ill. 322, 326.

⁹⁷ *Nixon v. Bolling*, 145 Ala. 277, 40 South. 210; *City of Kewanee v. Otley*, 204 Ill. 402, 68 N. E. 388; *Paddock v. Somes*, 102 Mo. 226, 14 S. W. 746, 10 L. R. A. 254; *Royce v. Carpenter*, 80 Vt. 37, 66 Atl. 888.

⁹⁸ *Central of Ga. Ry. Co. v. Americus Const. Co.*, 133 Ga. 392, 65 S. E. 855; *Nelson v. Milligan*, 151 Ill. 462, 38 N. E. 239; *Blaine v. Brady*, 64 Md. 373, 1 Atl. 609; *Atty. Gen. v. Cambridge Consumers' Gas Co.*, L. R. 4 Ch. 71, 38 L. J. Ch. 94, 19 L. T. Rep. N. S. 508. Cf. *Hudson & Delaware Canal Co. v. New York & E. R. Co.*, 9 Paige (N. Y.) 323.

⁹⁹ For illustrations of “legalized” public nuisances, see *Com. v. City of Boston*, 97 Mass. 555; *Chope v. Detroit & H. Plank Road Co.*, 37 Mich. 195, 26 Am. Rep. 512; *State v. Erie R. Co.*, 84 N. J. Law, 661; 87 Atl. 141, 46 L. R. A. (N. S.) 117; *Toledo Disposal Co. v. State*, 89

by constitutional prohibitions against the taking of private property except for public use, and even then only if just compensation is made.¹⁰⁰ It is at times difficult to determine whether there has been a "taking." An examination of the authorities reveals a decided conflict of opinion. The New Jersey Court of Errors and Appeals has said that the Constitution "secures to owners, not only the possession of property, but also those rights which render possession valuable. Whether you flood the farmer's fields, so that they cannot be cultivated, or pollute the bleacher's stream, so that his fabrics are stained, or fill one's dwelling with smells and noise, so that it cannot be occupied in comfort, you equally take away the owner's property. In neither instance has the owner any less of material things than he had before, but in each case the utility of his property has been impaired by a direct invasion of the bounds of his private dominion. This is the taking of his property in a constitutional sense."¹⁰¹ This would seem to set forth fairly the principle involved. The subject cannot be treated within the compass of this work, and besides it lies rather within the domain of constitutional law than of torts.¹⁰²

The following principles, however, are thoroughly established:

First: "That the statutory authority which will justify an injury to private property and afford immunity for acts which would otherwise be a nuisance must be express, or must be a clear and unquestionable implication from powers expressly conferred, and it must appear that the Legislature contemplated the doing of the very act which occa-

Ohio St. 230, 106 N. E. 6, L. R. A. 1915B, 1207; Danville, H. & W. R. Co. v. Com., 73 Pa. 29.

¹⁰⁰ See *Chicago G. W. Ry. Co. v. First Methodist Episcopal Church of Leavenworth City*, Kan., 102 Fed. 85, 42 C. C. A. 178, 50 L. R. A. 488.

¹⁰¹ *Pennsylvania R. Co. v. Angel*, 41 N. J. Eq. 316, 329, 7 Atl. 432, 56 Am. Rep. 1, note, per Dixon, J. *Bloom v. Koch*, 63 N. J. Eq. 10, 50 Atl. 621.

¹⁰² For illustrations of "taking," see *Evansville & C. R. Co. v. Dick*, 9 Ind. 433; *Lackland v. North Missouri R. Co.*, 31 Mo. 180; *Garvey v. Long Island R. Co.*, 159 N. Y. 323, 54 N. E. 57, 70 Am. St. Rep. 550;

sioned the injury.”¹⁰³ Thus a statute giving to a city the right to establish and regulate markets contemplates the use of its own lands for the purpose, and does not authorize it to establish a market in the street, which impedes traffic, fouls the pavement, and attracts great numbers of flies.¹⁰⁴ Authority given to a railroad to construct a tunnel does not justify the storage of explosives to be used therefor in a place where they are likely to prove injurious to others.¹⁰⁵ Nor may a city, empowered to construct works for treating sewage and to take lands for that purpose, escape liability to the owner of property not taken for a nuisance consisting of offensive odors and filthy percolations.¹⁰⁶

Second. The statutory right must be exercised in such a manner as to do no unnecessary injury. If the act may be done without creating a nuisance, one who does not adopt proper methods will be liable. Thus one who has a license to erect and maintain a steam engine within the city limits is not authorized thereby to maintain a nuisance by discharging smoke and soot from the smokestack.¹⁰⁷

Pumpelly v. Green Bay & M. Canal Co., 80 U. S. (13 Wall.) 166, 20 L. Ed. 557. But cf. *Sawyer v. Davis*, 136 Mass. 239, 49 Am. Rep. 27; *Carroll v. Wisconsin Central R. Co.*, 40 Minn. 168, 41 N. W. 661; *Benner v. Atlantic Dredging Co.*, 134 N. Y. 156, 31 N. E. 328, 30 Am. St. Rep. 649, 17 L. R. A. 220, 45 N. Y. St. Rep. 774; *Northern Transp. Co. v. Chicago*, 99 U. S. 635, 25 L. Ed. 336.

¹⁰³ *Bohan v. Port Jervis Gaslight Co.*, 122 N. Y. 18, 27, 25 N. E. 246, 9 L. R. A. 711, per Brown, J.

¹⁰⁴ *City of Richmond v. Smith*, 148 Ind. 294, 47 N. E. 630.

¹⁰⁵ *McAndrews v. Colterd*, 42 N. J. Law, 189, 36 Am. Rep. 508.

¹⁰⁶ *Bacon v. City of Boston*, 154 Mass. 100, 28 N. E. 9. For further illustrations, see *Inhabitants of Houlton v. Titcomb*, 102 Me. 272, 66 Atl. 733, 10 L. R. A. (N. S.) 580, 120 Am. St. Rep. 492; *Sammons v. City of Gloversville*, 175 N. Y. 346, 67 N. E. 622; *Missouri, K. & T. Ry. Co. of Texas v. Mott*, 98 Tex. 91, 81 S. W. 285, 70 L. R. A. 579; *Woodruff v. North Bloomfield Gravel Min. Co. (C. C.)* 18 Fed. 753.

¹⁰⁷ *Sullivan v. Royer*, 72 Cal. 248, 13 Pac. 655, 1 Am. St. Rep. 51. For further illustrations, see *Rand Lumber Co. v. City of Burlington*, 122 Iowa, 203, 97 N. W. 1096; *Towallga Falls Power Co. v. Sims*, 6 Ga. App. 749, 65 S. E. 844; *Village of Pine City v. Munch*, 42 Minn. 342, 44 N. W. 197, 6 L. R. A. 763; *Givens v. Van Studdiford*, 86 Mo. 149, 56 Am. Rep. 421; *Garvey v. Long Island R. Co.*, 159 N. Y. 323, 54 N. E. 57, 70 Am. St. Rep. 550.

Another defense is that the acts alleged to constitute a nuisance have been done lawfully under a right acquired by prescription. This can be interposed only where the nuisance is private, for there can be no prescriptive right to maintain a public nuisance.¹⁰⁸ It may be said generally that defendant must here establish that for the prescriptive period, which generally is twenty years, the right claimed has been exercised peaceably by him or by those in privity with him, and that the user was adverse, under a claim of right, and not by license, continuous, and not interrupted, and so open and notorious that the knowledge of the owner of the servient premises will be presumed.¹⁰⁹ It has been doubted whether one can acquire a prescriptive right to maintain a private nuisance that corrupts the atmosphere, there being here no actual or physical invasion of another's land. Theoretically there seems no good reason why he may not.¹¹⁰ Practically, it is almost, if not quite, impossible for him to do so, since he must establish that for the required period he has polluted the atmosphere to the extent and degree of which the plaintiff complains.¹¹¹ This would apply to such nuisances as noise,¹¹² and to a certain extent to the pollution of streams.¹¹³

¹⁰⁸ *Mayor and Aldermen of Birmingham v. Land*, 137 Ala. 538, 34 South. 613; *People v. Gold Run Ditch & Min. Co.*, 66 Cal. 138, 4 Pac. 1152, 56 Am. Rep. 80; *Hynes v. Brewer*, 194 Mass. 435, 80 N. E. 503, 9 L. R. A. (N. S.) 598.

¹⁰⁹ See *Silva v. Hawn*, 10 Cal. App. 544, 102 Pac. 952; *Alderman v. City of New Haven*, 81 Conn. 137, 70 Atl. 626, 18 L. R. A. (N. S.) 74; *Mueller v. Fruen*, 36 Minn. 273, 30 N. W. 886; *Bunten v. Chicago, R. I. & P. Ry. Co.*, 50 Mo. App. 414; *North Point Consolidated Irrigation Co. v. Utah & S. L. Canal Co.*, 16 Utah, 246, 52 Pac. 168, 40 L. R. A. 851, 67 Am. St. Rep. 607; *Charnley v. Shawano Water Power & River Imp. Co.*, 109 Wis. 563, 85 N. W. 507, 53 L. R. A. 895.

¹¹⁰ Cf. *Dana v. Valentine*, 5 Metc. (Mass.) 8; *Matthews v. Stillwater Gas & Electric Light Co.*, 63 Minn. 493, 65 N. W. 947; *Campbell v. Seaman*, 63 N. Y. 568, 20 Am. Rep. 567.

¹¹¹ See *Flight v. Thomas*, 10 Ad. & El. 590; *Wood on Nuisance* (3d Ed.) vol. 2, § 712 et seq.

¹¹² See *Heather v. Pardon*, 37 L. T. N. S. 393; *Sturges v. Bridgman*, L. R. 11 Ch. D. 852; *Elliotson v. Feetham*, 2 Bing. N. C. 134.

¹¹³ See *Lewis v. Stein*, 16 Ala. 214, 50 Am. Dec. 177; *Holsman v.*

It must also be kept in mind that merely because plaintiff has located near an existing nuisance will be no defense, for the ancient doctrine¹¹⁴ denying recovery in cases of "coming to a nuisance" has been exploded.¹¹⁵

Boiling Spring Bleaching Co., 14 N. J. Eq. 335; **Jones v. Crow**, 32 Pa. 398; **Murgatroyd v. Robinson**, 7 El. & B. 391.

¹¹⁴ Bl. Comm. book 2, p. 403.

¹¹⁵ **Hurlbut v. McKone**, 55 Conn. 31, 10 Atl. 164, 3 Am. St. Rep. 17; **Susquehanna Fertilizer Co. of Baltimore v. Malone**, 73 Md. 268, 20 Atl. 900, 9 L. R. A. 737, 25 Am. St. Rep. 595; **People v. Detroit White Lead Works**, 82 Mich. 471, 46 N. W. 735, 9 L. R. A. 722; **Campbell v. Seaman**, 63 N. Y. 568, 20 Am. Rep. 567.

CHAPTER XXI

CONSPIRACY

118. Definition.

DEFINED

118. A conspiracy may be roughly described as a combination of two or more persons to accomplish an unlawful purpose, or to accomplish a lawful purpose by unlawful means, followed by conduct pursuant thereto, whereby damage results.¹

“By the rules of the common law, an action of conspiracy, or, to use an equivalent expression, a writ of conspiracy, was never allowed but in two cases: One for conspiring to procure a man to be indicted for treason; the other for a conspiracy to prosecute a man for felony, by which life was put in danger.”² Later we find this form of action superseded by an action on the case in the nature of a conspiracy. It became the practice to treat the specific wrong, whether malicious prosecution or other tort, as the gist of the ac-

¹ This is not intended as a definition. It has been truly said that “what a conspiracy precisely is no one knows. Its definition is always question begging, and the only intelligible meaning of it seems to be that there is an indefinite class of offenses which become conspiracies because several unite in their execution and so render opposition by an individual more difficult.” 8 Harvard Law Review, 228. Perhaps the following (taken from Eddy on Combinations, § 171) comes nearest to accuracy: “Conspiracy is the combination of two or more persons to do (a) something that is unlawful, oppressive, or immoral; or (b) something that is not unlawful, oppressive, or immoral by unlawful, oppressive or immoral means; (c) something that is unlawful, oppressive, or immoral by unlawful, oppressive, or immoral means.” This broad definition, as the author states, “is made necessary in view of numerous decisions wherein combinations have been held illegal, neither the object nor the means of which were contrary to law, but were simply oppressive.”

² Parker v. Huntington, 2 Gray (Mass.) 124, 127, per Bigelow, J.; Van Horn v. Van Horn, 56 N. J. Law, 318, 28 Atl. 669.

tion. The charge of conspiracy was regarded as surplusage. If established, however, it was not without effect. It might serve to aggravate the wrong;³ it might extend liability beyond the active participants, since the conspirators became joint wrongdoers;⁴ lastly, it might extend the range of evidence, since, after a foundation has been laid by establishing *prima facie* the fact of conspiracy, the acts and declarations of each conspirator in pursuance of the original plan and with reference to the common object are evidence against all.⁵ It follows: First. That there must have been an act committed which of itself gave a cause of action.⁶ "The gist of the action is not the conspiracy charged, but the tort working damage to the plaintiff."⁷ Second. A verdict might be rendered in favor of one defendant and

³ See *Hansen v. Nicoll*, 40 App. D. C. 228, 236, Ann. Cas. 1914C, 759; *Van Horn v. Van Horn*, 52 N. J. Law, 284, 286, 20 Atl. 485, 10 L. R. A. 184; *Verplanck v. Van Buren*, 76 N. Y. 247, 259, 260; *Lee v. Kendall*, 56 Hun, 610, 614, 11 N. Y. Supp. 131, 32 N. Y. St. Rep. 165; *Porter v. Mack & Boren*, 50 W. Va. 581, 585, 40 S. E. 459.

⁴ "A conspiracy may, when accompanied by an overt act, create a liability, by reason of the fact that one or more conspirators may do an unlawful act which causes damage to another, by which all those engaged in the conspiracy for the accomplishment of the purpose for which the injury was done, and which was done in pursuance of the conspiracy, would be alike liable, whether actively engaged in causing the loss or not." *Doremus v. Hennessy*, 176 Ill. 608, 614, 52 N. E. 924, 43 L. R. A. 797, 68 Am. St. Rep. 203, per Phillips, J. In accord, *Woodruff v. Hughes* (1907) 2 Ga. App. 361, 58 S. E. 551, 553; *New England Foundation Co. v. Reed*, 209 Mass. 556, 560, 95 N. E. 935; *Cohen v. Nathaniel Fisher & Co.*, 135 App. Div. 238, 240, 120 N. Y. Supp. 546. For joint wrongdoers, see *supra*, p. 229 et seq.

⁵ *Zellerbach v. Allenberg*, 99 Cal. 57, 33 Pac. 786; *Taylor County v. Standley*, 79 Iowa, 666, 44 N. W. 911; *Brinkley v. Platt*, 40 Md. 529; *Well Bros. & Co. v. Cohn*, 4 Pa. Super. Ct. 443; *Schultz v. Frankfort Marine, Accident & Plate Glass Ins. Co.*, 151 Wis. 537, 139 N. W. 386, 43 L. R. A. (N. S.) 520.

⁶ *Beechley v. Mulville*, 102 Iowa, 602, 70 N. W. 107, 71 N. W. 428, 63 Am. St. Rep. 479; *Delz v. Winfree*, 80 Tex. 400, 16 S. W. 111, 26 Am. St. Rep. 755; *Wills v. Central Ice & Cold Storage Co.* (1905) 39 Tex. Civ. App. 483, 88 S. W. 265. Cf. *Brewster v. Miller's Sons Co.*, 101 Ky. 368, 41 S. W. 301, 38 L. R. A. 505; *Robertson v. Parks*, 76 Md. 118, 24 Atl. 411.

⁷ *James v. Evans*, 149 Fed. 136, 140, 80 C. C. A. 240, per Bradford, J. In accord, *Garing v. Fraser*, 76 Me. 37; *City of Boston v. Sim-*

against the other.⁸ This marked the difference between conspiracy the crime, and conspiracy the tort. To constitute the former, no overt act was necessary; the combination itself was the offense.⁹ Furthermore, though "indictments for conspiracy are not to all intents joint, for, where more than two are charged, some may be acquitted and the conviction of the rest, if two, will be good," yet they are "strictly joint so far as respects the constitution of the offense by two. And if it appear in the record in any manner that two did not participate in the unlawful intent, all are discharged, because neither is guilty of that offense."¹⁰

Assuming for the moment that there must be a cause of action independent of the conspiracy in order to give rise to an action in tort, it becomes evident that the accomplish-

mons, 150 Mass. 461, 23 N. E. 210, 15 Am. St. Rep. 230, 6 L. R. A. 629; *Laverty v. Vanarsdale*, 65 Pa. 507. Cf. *Savill v. Roberts*, 1 Ld. Raym. 374, 378.

⁸ *Van Horn v. Van Horn*, 56 N. J. Law, 318, 28 Atl. 669; *Jones v. Baker*, 7 Cow. (N. Y.) 445; *Laverty v. Vanarsdale*, 65 Pa. 507; *Ratcliffe v. Walker* (1915) 117 Va. 569, 85 S. E. 575; *James v. Evans*, 149 Fed. 136, 80 C. C. A. 240; *Skinner v. Gunton*, 1 Wms. Saund. 228.

⁹ *Smith v. State* (1913) 8 Ala. App. 187, 62 South. 575; *State v. Loser*, 132 Iowa, 419, 104 N. W. 337; *Com. v. Eastman*, 55 Mass. (1 Cush.) 189, 48 Am. Dec. 596; *People v. Watson*, 75 Mich. 582, 42 N. W. 1005; *State v. True Nell*, 79 Mo. App. 243. This in some states has been modified by statute. See Pen. Code Cal. § 184; *People v. Johnson* (1913) 22 Cal. App. 362, 134 Pac. 339; 2 Comp. St. N. J. 1910 (Crimes Act) p. 1757, § 37; *Wood v. State*, 47 N. J. Law, 461, 1 Atl. 509; Penal Law N. Y. (Consol. Laws, c. 40) §§ 580-583; *People v. Flack*, 125 N. Y. 324, 26 N. E. 267, 11 L. R. A. 807; Stat. Wls. (1898) § 4568; *State ex rel. Durner v. Hoyt*, 110 Wls. 189, 85 N. W. 1046, 62 L. R. A. 700; Rev. St. U. S. § 5440, Cr. Code U. S. (Act March 4, 1909, c. 321) § 37, 35 Stat. 1096 (U. S. Comp. St. 1913, § 10201); *Hyde v. Shine*, 199 U. S. 62, 25 Sup. Ct. 760, 50 L. Ed. 90.

¹⁰ *State v. Tom*, 13 N. C. 569, 578, per Ruffin, J. In accord, *People v. Hamilton*, 165 App. Div. 546, 151 N. Y. Supp. 125. So as to a *vol. pros.* entered as to one. *State v. Jackson*, 7 S. C. 283, 24 Am. Rep. 476. But if two are charged as conspiring with persons unknown, and the jury are satisfied that, though the defendants may not have conspired together, yet one of them did with some third unnamed and unknown person, the defendant so conspiring may be found guilty. *Com. v. Edwards*, 135 Pa. 475, 19 Atl. 1064; *United States v. Hamilton*, 26 Fed. Cas. No. 15,288.

ment of an unlawful purpose,¹¹ or the use of unlawful means,¹² will give rise to a cause of action. This is unquestioned. But the principle has been deduced that an act which might lawfully be done by one cannot be actionable if done by several.¹³ Some cases of interference with contractual rights have been decided on this ground.¹⁴ It has already been pointed out that the courts there failed to attach proper importance to the power of numbers and concert. In labor controversies, where the question has chiefly arisen, there is a strong tendency to break away from what has sometimes been said to be the established doctrine.

Is it therefore quite accurate to say that there can be no such tort as conspiracy?¹⁵ It would seem that there are many acts which may be harmful only when done by conspirators. The "combination has a power in its confederated form which no individual action can confer."¹⁶ For instance, for a single individual to express his disapproval of an actor by hissing might not be unlawful, but it would seem clearly actionable for a number to hiss pur-

¹¹ *Newton Co. v. Erickson*, 70 Misc. Rep. 291, 126 N. Y. Supp. 949; *Hutton v. Watters*, 132 Tenn. 527, 179 S. W. 134, L. R. A. 1916B, 1238, Ann. Cas. 1916C, 433; *Martens v. Rellly*, 109 Wis. 464, 84 N. W. 840; *White v. White* (1907) 132 Wis. 121, 111 N. W. 1116.

¹² *Wickersham v. Johnson*, 51 Mo. 313; *Van Horn v. Van Horn*, 52 N. J. Law, 284, 20 Atl. 485, 10 L. R. A. 184. Cf. *Karges Furniture Co. v. Amalgamated Woodworkers' Local Union No. 131*, 165 Ind. 421, 75 N. E. 877, 2 L. R. A. (N. S.) 788, 6 Ann. Cas. 829; *Sherry v. Perkins*, 147 Mass. 212, 17 N. E. 307, 9 Am. St. Rep. 689; *O'Callaghan v. Cronan*, 121 Mass. 114. And see generally "Interference with Contractual Rights," *supra*, p. 424 et seq.

¹³ *Rowan v. Butler* (1908) 171 Ind. 28, 85 N. E. 714; *Kimball v. Harman*, 34 Md. 407, 6 Am. Rep. 340; *City of Boston v. Simmons*, 150 Mass. 461, 23 N. E. 210, 6 L. R. A. 629, 15 Am. St. Rep. 230; *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, 55 N. W. 1119, 21 L. R. A. 337, 40 Am. St. Rep. 319; *Hunt v. Simonds*, 19 Mo. 583.

¹⁴ See chapter XVI, *supra*, p. 424 et seq.

¹⁵ Cf. *Jones v. Monson*, 137 Wis. 478, 484, 119 N. W. 179, 129 Am. St. Rep. 1082.

¹⁶ *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. 173, 186, 8 Am. Rep. 159. Cf. *Cornellier v. Haverhill Shoe Mfrs'. Ass'n* (1915) 221 Mass. 554, 109 N. E. 643, L. R. A. 1916C, 218; *State v. Dalton & Fay*, 134 Mo. App. 517, 114 S. W. 1132.

suant to a preconceived scheme.¹⁷ So an action for conspiracy to defame will lie, though the words are not actionable if spoken by one.¹⁸ For further illustration, take the tort fraud which may be so practiced that conspiracy becomes an essential element, as where A. confesses fraudulent judgments to B. for the purpose of cheating creditors, and B. issues executions and acquires the property sold thereunder.¹⁹ It seems difficult to say why conspiracy should not be treated as the wrong in cases such as these.²⁰

It only remains to add that, though the essential element is a common design, it is not necessary to prove an express compact or agreement. "It is sufficient that two or more persons in any manner either positively or tacitly come to a mutual understanding that they will accomplish the unlawful design."²¹ But it is not enough that there has been mere knowledge, acquiescence, or approval.²²

¹⁷ *Gregory v. Duke of Brunswick*, 6 M. & G. 205, 953, 1 C. & K. 24, 1 D. & L. 518, 8 Jur. 448, 13 L. J. C. P. 34, 47 E. C. L. 24. Cf. *Clifford v. Brandon*, 2 Campb. 358, 11 Rev. Rep. 731.

¹⁸ *Hood v. Palm*, 8 Barr (8 Pa.) 237.

¹⁹ *COLLINS v. CRONIN*, 117 Pa. 35, 11 Atl. 869, Chapin Cas. Torts, 383. To the same effect, *Place v. Minster*, 65 N. Y. 89. But see *James v. Evans*, 149 Fed. 136, 80 C. C. A. 240.

²⁰ Conspiracy "signifies," in the true and narrow sense, a wrongful combination of persons to do any act or acts which, when done, have brought to another an injury of a sort not admitting of being accomplished by one alone." Bishop on Noncontract Law, § 362. See, also, Bigelow on Torts (8th Ed.) p. 24. "Conspiracy as a Crime and as a Tort," by Francis M. Burdick, 7 Columbia Law Rev. 229; "The Tort of Conspiracy," by the same author, 8 Columbia Law Rev. 117.

²¹ Eddy on Combinations, vol. 1, § 368, cited in *Woodruff v. Hughes*, 2 Ga. App. 361, 365, 58 S. E. 551. In accord, *Deupree v. Thornton*, 97 Neb. 812, 151 N. W. 305; *Ratcliffe v. Walker* (1915) 117 Va. 569, 85 S. E. 575; *Patnode v. Westenhaver*, 114 Wis. 460, 90 N. W. 467.

²² *Brannock v. Bouldin*, 26 N. C. 61. Cf. *Hollinberger v. Stewart*, 41 App. D. C. 197. And see *supra*, p. 230.

TABLE OF CASES CITED

[THE FIGURES REFER TO PAGES]

A

- | | |
|--|--|
| <p>——— v. Fakenham, 262.
 Abb v. Northern Pac. R. Co., 124.
 Abbe v. Abbe, 135.
 Abbot v. McCadden, 187.
 Abbott v. Abbott, 134, 354.
 Abbott v. Treat, 400.
 Abercromble v. Bradford, 375.
 Aberthaw Const. Co. v. Cameron, 456.
 Abrahams v. Kidney, 468.
 Abston v. Waldon Academy, 204.
 Abt v. Burgheim, 262.
 Ackeret v. Minneapolis, 470.
 Ackerman v. Ellis, 567.
 Ackerman v. Jones, 329.
 Ackerson v. Erie R. Co., 241.
 Adair v. U. S., 429.
 Adams v. Barber, 411, 417.
 Adams v. Blodgett, 367.
 Adams v. Coleridge, 335.
 Adams v. Durham & N. R. Co., 367.
 Adams v. Farr, 353.
 Adams v. Fitchburg R. Co., 246.
 Adams v. Freeman, 234, 235, 361, 362.
 Adams v. Lawson, 300, 303.
 Adams v. New Jersey Steamboat Co., 530.
 Adams v. Paige, 475.
 Adams v. Richardson, 40.
 Adams v. Rivers, 357.
 Adams v. Smith, 341.
 Adams v. Stone, 303.
 Adams v. University Hospital, 204.
 Adams v. Young, 96.</p> | <p>Addicks v. Christoph, 186.
 Ætna Ins. Co. v. Boon, 101.
 Ætna Ins. Co. v. Reed, 400.
 Agate v. Lowenbein, 391, 392.
 Agnew v. Jones, 348.
 Ahern v. Collins, 274, 275.
 Ahern v. Steele, 228, 568, 569.
 Ailstock v. Moore Lime Co., 482.
 Ainsworth v. Lakin, 514.
 Aitken v. Bjerkvig, 411.
 Akers v. Chicago, St. P., M. & O. R. Co., 37, 501, 511.
 Alabama Great Southern R. Co. v. Arnold, 501.
 Alabama Great Southern R. Co. v. Burgess, 553.
 Alabama Great Southern R. Co. v. Chapman, 94.
 Alabama Great Southern R. Co. v. Jones, 355.
 Alabama Great Southern R. Co. v. Sellers, 25.
 Alabama Midland R. Co. v. Martin, 222.
 Alabama & V. R. Co. v. Tirelli, 529.
 Albert v. Strange, 288.
 Albro v. Jaquith, 171, 174.
 Alcorn v. Mitchell, 257.
 Alden v. Wright, 74.
 Alderman v. New Haven, 578.
 Aldine Mfg. Co. v. Barnard, 27.
 Aldrich v. Gorham, 99.
 Aldrich v. Wetmore, 560, 561.
 Aldrich v. Wright, 364.
 Aldridge v. Stuyvesant, 454.
 Alexander v. Church, 394.
 Alexander v. Harrison, 486.</p> |
|--|--|

[The figures refer to pages]

- Alexander v. Jenkins, 310.
 Alexander v. New Castle, 87.
 Alexander v. Pennsylvania Co., 250.
 Alexander v. Relfe, 208.
 Alexander v. Southey, 380.
 Allaire v. St. Luke's Hospital, 132.
 Allan v. State S. S. Co., 206.
 Allbutt v. General Council, etc., 330, 331.
 Allec v. Reece, 148.
 Allegheny Coke Co. v. Massey, 547.
 Allen v. Baker, 82.
 Allen v. Crofoot, 358.
 Allen v. Flood, 66, 425, 431, 447.
 Allen v. Forsythe, 459, 464.
 Allen v. Frawley, 401.
 Allen v. Hixson, 177.
 Allen v. Smith, 227.
 Allen v. Truesdell, 395.
 Allen v. Wortham, 88.
 Allen v. Wright, 284.
 Allentown v. Kramer, 200.
 Alletson v. Powers, 31.
 Allgor v. Stillwell, 493.
 Allin v. Connecticut River Lumber Co., 240.
 Allison v. Hobbs, 232, 236.
 Allison v. Jack, 410.
 Allison v. President, etc., of Farmers' Bank of Virginia, 8.
 Allsop v. Allsop, 83, 313.
 Almy v. Harris, 33.
 Alsop v. Lidden, 491.
 Alton v. Midland R. Co., 19.
 Amberg v. Kinley, 534.
 Ambergate, etc., R. Co. v. Midland R. Co., 363.
 Ambrosius v. O'Farrell, 335.
 Ambs v. Atchison, T. & S. F. R. Co., 484.
 American Banana Co. v. United Fruit Co., 198.
 American Car & Foundry Co. v. Spears, 216.
 American Federation of Labor v. Buck's Stove & Range Co., 442, 443.
 American-German Nat. Bank v. Gray & Dudley Hardware Co., 376.
 American Law Book Co. v. Edward Thompson Co., 455.
 American Lead Pencil Co. v. Nashville, C. & St. L. Ry., 530.
 American Malting Co. v. Keitel, 452.
 American Print Works v. Lawrence, 106.
 American Pub. Co. v. Gamble, 330.
 American S. S. Co. v. Bryan, 530.
 American Tobacco Co. v. Polisco, 547.
 American Union Tel. Co. v. Middleton, 243.
 Ames v. Hazard, 320.
 Amperse v. Winslow, 150.
 Anderson v. Dickie, 567.
 Anderson v. Foley Bros., 179.
 Anderson v. Gorrie, 144.
 Anderson v. Gouldberg, 382.
 Anderson v. Hayes, 502.
 Anderson v. How, 483.
 Anderson v. Ryan, 469.
 Anderson v. State, 267.
 Andres v. Koppenheaver, 306.
 Andrews v. Blakeslee, 453.
 Andrews v. Chapman, 330.
 Andrews v. Mason City & Ft. D. R. Co., 213.
 Andrews v. Mockford, 404.
 Andrews v. Murray, 238.
 Andrews v. Shaw, 383, 384.
 Angle v. Chicago, St. P., M. & O. R. Co., 450, 455.
 Angus v. Clifford, 412.
 Ankeny v. Moffett, 238.
 Anonymous, 55, 66, 107, 258, 285, 305, 311, 317, 318, 439.
 Anthony v. Gilbert, 369.
 Antle v. Sexton, 399.

[The figures refer to pages]

- Apello v. Worsley, 440.
 Apgar v. Woolston, 478, 484.
 Appel v. Eaton & Prince Co., 223.
 A. R. Barnes & Co. v. Berry, 435.
 Ardesco Oil Co. v. Gilson, 223.
 Argotsinger v. Vines, 366.
 Arkerson v. Dennison, 193.
 Armendiaz v. Stillman, 243.
 Armory v. Delamirie, 382.
 Armour v. Golkowska, 181.
 Armour v. Hahn, 182.
 Armstrong County v. Clarion
 County, 238.
 Arnheim v. Arnheim, 441.
 Arnold v. Ingram, 295, 300, 337,
 340.
 Arnold v. St. Louis & S. F. R.
 Co., 467.
 Arnold v. Sayings Co., 330.
 Aron v. De Castro, 74.
 Arp v. Allis-Chalmers Co., 245.
 Arthur v. Griswold, 396.
 Artz v. Chicago, R. I. & P. R.
 Co., 542.
 Arundell (Lady) v. Phipps, 360.
 Aschermann v. Philip Best Brew-
 ing Co., 374, 378.
 Ashby v. White, 71, 72, 151.
 Ashcroft v. Hammond, 333, 338,
 340.
 Ashley v. Dixon, 451.
 Ashman v. Flint & P. M. R. Co.,
 35.
 Ashton v. Allen, 376.
 Astin v. Chicago, M. & St. P. R.
 Co., 523.
 Atchison, T. & S. F. R. Co. v. Al-
 len, 532.
 Atchison, T. & S. F. R. Co. v.
 Bales, 76.
 Atchison, T. & S. F. R. Co. v. Cun-
 ingham, 125.
 Atchison, T. & S. F. R. Co. v.
 Gee, 434.
 Atchison, T. & S. F. R. Co. v.
 McGinnis, 83.
 Atchison, T. & S. F. R. Co. v.
 Watson, 483.
 Atkins v. Field, 171.
 Atkinson v. Goodrich Transp. Co.,
 96, 98.
 Atkinson v. John E. Doherty &
 Co., 288, 291.
 Atkinson v. Newcastle Water-
 works Co., 34, 35.
 Atkinson v. Rittenhouse, 133.
 Atlanta Nat. Bank v. Davis, 23.
 Atlanta News Pub. Co. v. Med-
 lock, 329.
 Atlanta St. R. Co. v. Walker, 114.
 Atlanta & F. R. Co. v. Kimber-
 ly, 215, 219, 234.
 Atlanta & W. P. R. Co. v. West,
 501.
 Atlantic Dock Co. v. New York,
 122.
 Atlantic & D. R. Co. v. Ironmon-
 ger, 552.
 Attorney General v. Cambridge
 Consumer's Gas Co., 575.
 Attorney General v. Evart Boom-
 ing Co., 560.
 Attorney-General v. Steward &
 Taylor, 558.
 Attwood v. Monger, 482.
 Atwater v. Morning News Co.,
 340.
 Atwill v. Mackintosh, 334.
 Atwood v. Chapman, 403.
 Auchmuty v. Ham, 232.
 Aultman v. Waddle, 498.
 Austin v. Cox, 167.
 Austin v. Dowling, 280.
 Austin v. Fisher Tanning Co.,
 184.
 Austin v. Rawdon, 31.
 Austin v. Vrooman, 144, 149.
 Auworth v. Johnson, 391.
 Avakian v. Noble, 234.
 Averill v. Longfellow, 137.
 Aycrigg's Ex'rs v. New York &
 E. R. Co., 213.

[The figures refer to pages]

Ayer v. Ashmead, 237.
 Ayers v. Grider, 301.
 Ayre v. Craven, 311.
 Ayres v. French, 372.

B

B. v. Sheriff of Middlesex, 153.
 Bach v. New, 269.
 Bachelder v. Heagan, 526.
 Backentoss v. Speicher, 397.
 Backhouse v. Bonomi, 131.
 Bacon v. Boston, 577.
 Bacon v. Casco Bay Steamboat Co., 531.
 Bacon v. Cropsey, 154.
 Bacon v. Sheppard, 353.
 Bacon v. Towne, 484, 485.
 Badgley v. Decker, 470, 471.
 Badgley v. Hedges, 327.
 Bageard v. Consolidated Traction Co., 549.
 Bahr v. Lombard, Ayres & Co., 538.
 Bailey v. Frazier, 406.
 Bailey v. North Carolina R. Co., 500.
 Bailey v. Oatis, 416.
 Bailey v. Rome, W. & O. R. Co., 180, 181.
 Bailly v. Merrell, 416.
 Bair v. Struck, 153.
 Baird v. Carle, 459, 464.
 Baird v. Howard, 375.
 Baird v. New York Cent. & H. R. R. Co., 182.
 Baird v. Shipman, 172, 174.
 Baker v. Drake, 388.
 Baker v. Hallam, 402.
 Baker v. Mims, 368.
 Baker v. Seahorn, 403.
 Baker v. Sebright, 392.
 Baker v. Sheehan, 155.
 Baker v. Trotter, 416.
 Baker v. Troy Compress Co., 382.
 Baldwin v. Abraham, 223.
 Baldwin v. Boulware, 343.
 Baldwin v. Harvey, 386.

Baldwin v. Hayden, 267.
 Baldwin v. Smith, 111.
 Baldwin v. Walser, 317.
 Ball v. Bruce, 469, 471, 473.
 Ball v. Liney, 381.
 Ball v. Nye, 515.
 Ballew v. Alexander, 8.
 Baltimore & H. R. Co. v. Algire, 360.
 Baltimore & O. R. Co. v. Baugh, 192.
 Baltimore & O. R. Co. v. Boyd, 367.
 Baltimore & O. R. Co. v. O'Donnell, 374, 385.
 Baltimore & O. R. Co. v. Owings, 505.
 Baltimore & O. R. Co. v. Reed, 251.
 Baltimore & O. R. Co. v. Ritchie, 118.
 Baltimore & O. R. Co. v. State, 178.
 Baltimore & O. R. Co. v. Sulphur Spring Independent School Dist., 513.
 Baltimore & O. R. Co. v. Waters, 111.
 Baltimore & O. R. Co. v. Welch, 504.
 Baltimore & P. R. Co. v. Fifth Baptist Church, 135, 207, 558.
 Baltzen v. Nicolay, 414.
 Bandlow v. Thieme, 389.
 Banfield v. Whipple, 231.
 Bank v. Brainerd School District, 203.
 Bank of Atchison County v. Byers, 404, 411.
 Bank of Hartford County v. Waterman, 130.
 Banks v. Eastern Ry. & Lumber Co., 446.
 Banta v. Palmer, 399.
 Barbaud v. Hookham, 333.
 Barbee v. Armstead, 459.
 Barbee v. Reese, 165.

[The figures refer to pages]

- | | |
|--|---|
| <p> Barbler v. Connolly, 109.
 Barbour v. Shebor, 534.
 Barbour v. Stephenson, 469, 472.
 Barclay v. Abraham, 69.
 Barden v. Atlantic Coast Line R. Co., 205.
 Barham v. Nethersal, 302.
 Barhight v. Tammany, 484.
 Barholt v. Wright, 116.
 Barker v. Chase, 356.
 Barker v. Miller, 355.
 Barkley v. Williams, 2.
 Barley v. Walford, 406.
 Barman v. Spencer, 508.
 Barnard v. Campbell, 376.
 Barndt v. Frederick, 408.
 Barnes v. Allen, 458, 459.
 Barnes v. Crawford, 308.
 Barnes v. Lucille, 522.
 Barnes v. McCrate, 327.
 Barnes v. Quigley, 31.
 Barnes v. Trundy, 316.
 Barnes & Co. v. Berry, 435.
 Barnett v. Contra Costa Co., 203.
 Barnett v. St. Anthony Falls Water Power Co., 366.
 Barnett & Record Co. v. Schlappa, 16.
 Barnum v. Terpening, 522.
 Barr v. Essex Trades Council, 442.
 Barranco v. Birmingham Ry., Light & Power Co., 573.
 Barrett v. Lake Ontario Beach Imp. Co., 502, 510.
 Barrett v. Third Ave. R. Co., 97, 231.
 Barron v. Cobleigh, 356.
 Carron v. Davis, 371.
 Barrow v. Gaillardanne, 558.
 Barrows v. Bell, 331.
 Barry v. Calder, 372.
 Barry v. Third Ave. R. Co., 480.
 Barstow v. Sprague, 354.
 Bartlett v. Christliff, 495.
 Bartlett v. Clarksburg, 202.
 Bartlett v. Hawley, 489. </p> | <p> Barton v. Kavanaugh, 481.
 Barton v. Syracuse, 200.
 Bascom v. Dempsey, 354.
 Basebe v. Matthews, 485, 489.
 Bass v. Pierce, 356.
 Bassell v. Elmore, 299, 313.
 Basset v. Maynard, 374.
 Bassett v. Bassett, 464.
 Bast v. Leonard, 224.
 Basten v. Carew, 144.
 Bates v. Clark, 138.
 Bates v. Stansell, 386.
 Bath v. Metcalf, 231.
 Bathrick v. Detroit Post & Tribune Co., 329.
 Batson v. Higginbotham, 365.
 Battersby v. Collier, 338.
 Bauer v. Richter, 179.
 Baum v. Clause, 319.
 Baumeister v. Markham, 218.
 Baxter v. Roberts, 186.
 Baylis v. Lawrence, 345.
 Bayliss v. Grand Lodge of State of Louisiana, 333.
 Baylor v. Delaware, L. & W. R. Co., 187.
 Baynes v. Brewster, 283.
 Beach v. Hancock, 255, 256.
 Beach v. Ranney, 133.
 Beacham v. Proprietors of Portsmouth Bridge, 251.
 Beall v. McGehee, 400.
 Bean v. Western N. C. R. Co., 125.
 Bearce v. Bass, 323.
 Beard v. Bliley, 394.
 Beardsley v. Duntley, 399.
 Beare v. Wright, 399.
 Beaton v. Tarrant, 435.
 Beattie v. Callanan, 449, 456.
 Beattie v. Detroit United Ry., 531.
 Beaty v. Perkins, 46.
 Beaudette v. Gagne, 469.
 Beaulieu v. Portland Co., 183.
 Beaver v. Mason, Ehrman & Co., 535.
 Bechel v. Pacific Exp. Co., 485. </p> |
|--|---|

[The figures refer to pages]

- Beck v. Carter, 503, 510.
 Beck v. Minneapolis Union R. Co., 259.
 Beck v. Railway Teamsters' Protective Union, 430, 435, 442, 444.
 Beck v. Southern R. Co., 178.
 Becker v. Baillies, 368.
 Becker v. Mason, 158.
 Beckford v. Wade, 246.
 Beckley v. Skroh, 570.
 Beckwith v. Philby, 284.
 Bedan v. Turney, 459.
 Beddall v. Maitland, 268, 270.
 Beebe v. Mead, 381.
 Beechley v. Mulville, 581.
 Beehler v. Daniels, Cornell & Co., 508, 509.
 Beekman v. Marsters, 448, 450, 452.
 Beekman v. Van Dolsen, 390.
 Beers v. McGinnis, 358.
 Beesley v. F. W. Wheeler & Co., 192.
 Behling v. State, 260.
 Behm v. Damm, 364.
 Belsel v. Gerlach, 459, 463.
 Belser v. Scripps-McRae Pub. Co., 329.
 Belgenland, The, 248.
 Belknap v. Schild, 138.
 Bell v. Bank of California, 130.
 Bell v. Central Nat. Bank of Washington, 512.
 Bell v. Great Northern R. Co., 85.
 Bell v. Houston & S. R. Co., 511.
 Bell v. Josselyn, 41, 173, 174.
 Bell v. Keepers, 481.
 Bell v. McKinney, 147.
 Bell v. Midland R. Co., 454.
 Bell v. Percy, 485.
 Bell v. Stone, 315.
 Bellant v. Brown, 40.
 Bellefontaine & I. R. Co. v. Snyder, 554.
 Bellows v. Pennsylvania & N. Y. Canal & R. Co., 185.
 Belt v. Simkins, 392.
 Bemisch v. Roberts, 187.
 Benedick v. Potts, 538.
 Benedict v. Guardian Trust Co., 417.
 Bennan v. Parsonnet, 116.
 Benner v. Atlantic Dredging Co., 577.
 Bennett v. Bennett, 465.
 Bennett v. Deacon, 335.
 Bennett v. Ives, 170.
 Bennett v. Louisville & N. R. Co., 532.
 Bennett v. McIntire, 358.
 Bennett v. Williamson, 317.
 Benson v. Baltimore Traction Co., 508.
 Benson v. Goodwin, 193.
 Benton v. Pratt, 455, 456.
 Benton v. State, 303.
 Berdeaux v. Davis, 305, 307.
 Berg v. Parsons, 215, 225.
 Berger v. Minneapolis Gaslight Co., 514, 515, 574.
 Berger v. Saul, 481.
 Berger v. Standard Oil Co., 519.
 Bergeron v. Miles, 418.
 Bergin v. Hayward, 156.
 Bergstrom v. Ridgway Co., 342.
 Berman v. Kling, 373.
 Bernina, The, 551.
 Berrer v. Moorhead, 154.
 Berrigan v. New York, L. E. & W. R. Co., 184.
 Berry v. Adamson, 275.
 Berry v. Carle, 364.
 Berry v. Donovan, 447.
 Berry v. Sugar Notch, 102, 114.
 Bertha Zinc Co. v. Martin's Adm'r, 175.
 Beseman v. Pennsylvania R. Co., 75.
 Bettys v. Milwaukee & St. P. R. Co., 240, 247.
 Bevard v. Hoffman, 151.
 Bickerdike v. State, 197.

[The figures refer to pages]

- | | |
|---|--|
| <p>Bielman v. Chicago, St. P. & K. C. R. Co., 564.
 Blewer v. Mueller, 401.
 Bigaouette v. Paulet, 457, 459, 460.
 Bigby v. U. S., 28, 29, 197.
 Bigelow v. Stearns, 145.
 Bigney v. Fisher, 527.
 Bileu v. Paisley, 348.
 Billings v. Breinig, 36.
 Billman v. Indianapolis, C. & L. R. Co., 93.
 Billson v. Linderberg, 119.
 Binford v. Johnston, 63.
 Bingham v. Gaynor, 322.
 Binns v. Vitograph Co. of America, 289.
 Birch v. Benton, 306, 307.
 Birchall v. Third Nat. Bank, 24.
 Bird v. Holbrook, 264, 504.
 Bird v. Jones, 274.
 Bird v. Womack, 365.
 Birkett v. Knickerbocker Ice Co., 547, 553.
 Birmingham Ry. & Electric Co. v. Bowers, 500.
 Birmingham Ry., Light & Power Co. v. Aetna Accident & Liability Co., 545.
 Birmingham Ry., Light & Power Co. v. Girod, 525.
 Birmingham Ry., Light & Power Co. v. Parker, 255.
 Birmingham Ry., Light & Power Co. v. Sawyer, 178.
 Birmingham Realty Co., Ex parte, 346.
 Bishop v. Banks, 558.
 Bishop v. Readsboro Chair Mfg. Co., 569.
 Bishop v. St. Paul City R. Co., 80.
 Bishop v. Weber, 93, 518.
 Bissell v. Gold, 281.
 Bissell v. Press Pub. Co., 328.
 Bistider v. Lehigh Valley R. Co., 533.</p> | <p>Bitterman v. Louisville & N. R. Co., 450, 454.
 Bitting v. Ten Eyck, 485.
 Bitz v. Meyer, 479.
 Bixby v. Brundige, 481.
 Bixby v. Parsons, 169.
 Bjorklund v. Seattle Electric Co., 126.
 Black v. Carrollton R. Co., 472.
 Black v. Eason, 373.
 Black v. New York, N. H. & H. R. Co., 12.
 Blackham v. Pugh, 332.
 Blackman v. West Jersey & S. S. R. Co., 485.
 Blackmore v. Tiddlerley, 127.
 Blaen Avon Coal Co. v. McCulloh, 61.
 Blaine v. Brady, 575.
 Blake v. Barnard, 256.
 Blake v. Brothers, 151.
 Blake v. Lanyon, 445, 446.
 Blake v. Maine Cent. R. Co., 183.
 Blake v. Smith, 307.
 Blakeslee v. Tyler, 167.
 Blanchard v. Baker, 72.
 Blanchard v. Dow, 152.
 Blanchard v. Isley, 469, 471.
 Blanchard v. New Jersey Steamboat Co., 114.
 Blankenship v. Berry, 380.
 Blankenship v. Chesapeake & O. R. Co., 505.
 Blass Dry Goods Co. v. Reinman & Wolfort, 565.
 Blate v. Third Ave. R. Co., 540, 541.
 Blickenstaff v. Perrin, 342.
 Bliss v. Johnson, 268.
 Bliss v. New York Cent. & H. R. R. Co., 122, 125.
 Blodgett v. Race, 145, 149.
 Blomen v. N. Barstow Co., 558.
 Blood Balm Co. v. Cooper, 93, 518.
 Bloom v. Koch, 576.
 Bloomer v. Snellenburg, 362.
 Bloomingdale v. Chittenden, 132.</p> |
|---|--|

[The figures refer to pages]

- Blossom v. Barrett, 402.
 Blovelt v. Sawyer, 177.
 Blue v. Briggs, 170.
 Bluedorn v. Missouri Pac. R. Co., 74.
 Blumb v. Kansas City, 217, 223.
 Blumenfeld v. Stine, 409.
 Blumhardt v. Rohr, 308.
 Blunk v. Atchison, T. & S. F. R. Co., 488.
 Blythe v. Denver & R. G. R. Co., 529.
 Boardman v. Sill, 380, 381.
 Board of Com'rs of Wabash County v. Pearson, 131.
 Board of Health of New Rochelle v. Valentine, 228.
 Board of Health of North Brunswick Tp. v. Lederer, 567.
 Board of Water Com'rs of City of New London v. Robbins, 401, 415.
 Boaz v. Tate, 477.
 Bobb v. Bosworth, 266.
 Bockes v. A. McAfee & Son Co., 368.
 Boddy v. Henry, 399, 412, 418.
 Bode v. Lee, 382.
 Bodwell v. Osgood, 341.
 Boeger v. Langenberg, 280.
 Boettger Silk Finishing Co. v. Electrical Audit & Rebate Co., 31.
 Bogert v. Haight, 362.
 Bohan v. Port Jervis Gaslight Co., 563, 577.
 Bohlinger v. Germania Life Ins. Co., 334.
 Bohn Mfg. Co. v. Erickson, 184, 185.
 Bohn Mfg. Co. v. Hollis, 440, 583.
 Boileau v. Records & Breen, 402.
 Boland v. Stanley, 458, 459.
 Bolger v. Boston Elevated R. Co., 461.
 Bolin v. Chicago, St. P., M. & O. R. Co., 501, 524.
 Bolles Wooden Ware Co. v. U. S., 136.
 Bolling v. Kirby & Bro., 380.
 Bonaparte v. Wiseman, 217.
 Bond v. Chapin, 496.
 Bonelli v. Bowen, 366.
 Bonnell v. Smith, 64.
 Bonney v. King, 495.
 Bonney v. Smith, 363.
 Boody v. Watson, 72.
 Boogher v. Knapp, 330.
 Boogher v. Life Ass'n of America, 207.
 Boogren v. St. Paul City R. Co., 137.
 Boomer v. Wilbur, 218.
 Boor v. Lowrey, 118.
 Boosey v. Wood, 121.
 Booth v. Arnold, 310.
 Booth v. Kurrus, 149, 281.
 Booth v. Manchester St. Ry., 461.
 Booth v. Rome, W. & O. T. R. Co., 350.
 Booth v. Sanford, 87.
 Booth & Bro. v. Burgess, 443, 448, 456.
 Booth & Co. v. Seibold, 450.
 Borggard v. Gale, 502.
 Bornmann v. Star Co., 314.
 Bossingham v. Syck, 398.
 Bostock-Ferari Amusement Co. v. Brocksmith, 523.
 Boston v. Neat, 356.
 Boston v. Tatam, 307.
 Boston Beef Packing Co. v. Stevens, 228.
 Boston & A. R. Co. v. Shanly, 92, 232.
 Boston & M. R. Co. v. Hurd, 247.
 Boston & M. R. Co. v. McDuffey, 245.
 Boston & W. R. Corp. v. Dana, 7.
 Bostwick v. Lewis, 476.
 Boswell & Woolley v. Carlisle, Jones & Co., 355.
 Bosworth v. Swansey, 114.
 Boulware v. Craddock, 154.

[The figures refer to pages]

- Bourland v. Eldson, 344.
 Bourlier Bros. v. Macaulay, 445.
 Bowden v. Lewis, 572.
 Bowditch v. Boston, 107.
 Bowe v. Hunking, 502.
 Bowen v. Fenner, 382.
 Bowen v. Hall, 445, 446, 448, 453.
 Bowen v. Matheson, 439.
 Bower v. Hill, 72.
 Bower v. Peate, 216, 217, 218.
 Bowlin v. Nye, 374.
 Bowman v. Brown, 266.
 Bowman v. Carithers, 406.
 Box v. Jubb, 513.
 Boxsius v. Goblet Freres, 338.
 Boyce v. Wilbur Lumber Co., 541.
 Boyd v. Clark, 246.
 Boyd v. Cross, 482, 483.
 Boyd v. Mendenhall, 484.
 Boyd v. State, 271.
 Boyd's Ex'rs v. Browne, 405.
 Boydell v. Jones, 300.
 Boyden v. Bragaw, 359.
 Boyer v. Bolender, 238.
 Boyer v. Eastern R. Co., 184.
 Boyle v. Brandon, 469.
 Boyles v. Knight, 237.
 Boyson v. Thorn, 452, 455.
 Brackett v. Griswold, 62, 396, 406.
 Brackett v. Vining, 357.
 Bradford v. Wright, 406.
 Bradlaugh v. Erskine, 272.
 Bradlaugh v. Newdegate, 497.
 Bradley v. Davis, 358, 371.
 Bradley v. Fisher, 143, 144, 146.
 Bradley v. Lake Shore & M. S. R. Co., 530.
 Bradley v. Oviatt, 406.
 Bradshaw v. Frazier, 493.
 Bradt v. New Nonparel Co., 83.
 Brady v. Edwards, 400.
 Brady v. Springfield Traction Co., 531.
 Brady v. Valentine, 509.
 Braem v. Merchants' Nat. Bank of Syracuse, 9, 475.
 Bragdon v. Perkins-Campbell Co., 519.
 Bragg v. Central New England R. Co., 544.
 Brainard v. Head, 156.
 Brainerd v. Dunning, 234.
 Braley v. Powers, 407, 414.
 Brame v. Clark, 365.
 Branch v. Doane, 72.
 Brand v. Hinchman, 491.
 Brandt v. Krogh, 408.
 Branham's Adm'r v. Buckley, 512.
 Brannock v. Bouldin, 230, 584.
 Brannock v. Elmore, 225.
 Brauckman v. Leighton, 408.
 Braun v. Buffalo General Electric Co., 526.
 Braun v. Craven, 83.
 Braverman v. Hart, 227.
 Bray v. Callihan, 309.
 Brazil v. Moran, 166.
 Breen v. Field, 174.
 Breen v. New York Cent. & H. R. R. Co., 537.
 Breitenbach v. Trowbridge, 362.
 Brendle v. Spencer, 501.
 Brennan v. Gordon, 192.
 Brennan v. Merchant & Co., 213.
 Brennan v. United Hatters, 426.
 Brennen Const. Co. v. Cumberland, 515.
 Brent v. Kimball, 364.
 Bretherton v. Wood, 15.
 Brewer v. Chase, 333.
 Brewster v. Miller, 9.
 Brewster v. Miller's Sons Co., 581.
 Brezee v. Powers, 510.
 Brian v. Tims, 127.
 Brice v. Bauer, 522.
 Brickell v. New York Cent. & H. R. R. Co., 552.
 Brickhouse v. Brickhouse, 372.
 Bridger v. Asheville & S. R. Co., 252.
 Bridges v. Bridges, 114.
 Bridgett v. Coyney, 273, 276.

[The figures refer to pages]

- Bridgman v. Hopkins, 341.
 Briggs v. Bennett, 355.
 Briggs v. Boston & L. R. Co., 388.
 Briggs v. Evans, 469, 471.
 Briggs v. Light Boat Upper Cedar Point, 196.
 Brigham v. Overstreet, 389.
 Bright v. Barnett & Record Co., 519.
 Brightman v. Bristol, 573.
 Brill v. Flagler, 571.
 Brimberry v. Savannah, F. & W. R. Co., 569.
 Brinkley v. Platt, 581.
 Brinsmead v. Harrison, 237.
 Briscoe v. Southern R. Co., 550.
 Bristol v. Burr, 270.
 British South Africa Co. v. Companhia de Mocambique, 241.
 Brittain v. McKay, 352.
 Brittain v. Payne, 27.
 Brockett v. Fair Haven & W. R. Co., 556.
 Broder v. Zeno Mauvais Music Co., 111.
 Broderick v. Detroit Union R. R. Station & Depot Co., 177.
 Broderick v. St. Paul City R. Co., 182.
 Bromage v. Prosser, 338.
 Brommer v. Pennsylvania R. Co., 533.
 Brook v. Rawl, 421.
 Brooker v. Coffin, 305.
 Brooks v. Mangan, 149.
 Brooks v. St. John, 142.
 Brooks v. Schwerin, 462.
 Broughton v. McGrew, 312, 337.
 Brounstein v. Sahlein, 479.
 Brow v. Hathaway, 332, 337, 340.
 Brown v. Boston Ice Co., 213, 504.
 Brown v. Boston & M. R. R., 504.
 Brown v. Bridges, 355.
 Brown v. Brown, 135, 466.
 Brown v. Cambridge, 124.
 Brown v. Carpenter, 558.
 Brown v. Collins, 55, 514.
 Brown v. Corcoran, 454.
 Brown v. Coxe Bros. & Co., 232, 236.
 Brown v. Dawson, 269.
 Brown v. Dean, 119.
 Brown v. De Groff, 571.
 Brown v. Giles, 347.
 Brown v. Globe Printing Co., 329.
 Brown v. Gordon, 261.
 Brown v. Hawkes, 489.
 Brown v. Howard, 170, 272, 285.
 Brown v. Kendall, 55, 56.
 Brown v. Kistleman, 466.
 Brown v. Knapp & Co., 329, 330.
 Brown v. McAllister, 569.
 Brown v. McBride, 486.
 Brown v. McIntyre, 479.
 Brown v. Manter, 346.
 Brown v. Myers, 301.
 Brown v. Nickerson, 306.
 Brown v. Oregon-Washington R. & Nav. Co., 525.
 Brown v. Perkins, 231, 346, 365, 560, 571, 572.
 Brown v. Providence Telegram Pub. Co., 329.
 Brown v. Randall, 490.
 Brown v. Shaw, 384.
 Brown v. State, 254, 260.
 Brown v. Vannaman, 336.
 Brown v. Vinalhaven, 201.
 Brown v. Webster City, 235.
 Brown v. Wheeler, 120.
 Brown v. Wittner, 36.
 Brown v. Wooton, 237.
 Brown Paper Co. v. Dean, 174.
 Brown Store Co. v. Chattahoochee Lumber Co., 524.
 Browne v. Hawkins, 315.
 Browne v. West, 497.
 Browning v. Jones, 460.
 Bruce v. Central M. E. Church, 206.
 Bruce v. Ruler, 403.
 Bruce v. Soule, 308.
 Bruch v. Carter, 67, 352.
 Brueshaber v. Hertling, 338.

[The figures refer to pages]

- Bruff v. Mall**, 170.
Brunswick v. Hanover, 198.
Brush v. Blot, 320.
Brusso v. Buffalo, 219.
Bryan v. State, 445.
Bryant v. Herbert, 14.
Bryant v. Jackson, 163.
Bube v. Birmingham Ry., Light & Power Co., 472.
Buchanan v. Rowland, 127.
Buchanan v. Smith, 378.
Buchanan v. Stout, 347.
Buchholz v. New York, L. E. & W. R. Co., 561.
Buck v. Colbath, 154.
Buck v. Hersey, 312.
Buck v. McIntosh, 571, 572.
Buckl v. Cone, 41.
Buckley v. Gutta Percha & Rubber Mfg. Co., 185.
Buckley v. O'Niel, 300.
Bucklin v. Beals, 375.
Bucknan v. Great Northern R. Co., 84.
Buckstaff v. Hicks, 330.
Buckstaff v. Viall, 300, 314, 324.
Budd v. Multnomah R. Co., 370, 372.
Buehner v. Creamery Package Mfg. Co., 181.
Buel v. New York Cent. R. Co., 90.
Buenzle v. Newport Amusement Ass'n, 361.
Buffalo Lubricating Oil Co. v. Standard Oil Co., 207.
Buffington v. Clarke, 380.
Bulkley v. Dolbeare, 355.
Bullitt v. Farrar, 415.
Bullock v. Babcock, 57, 258.
Bump v. Betts, 491.
Bundy v. Dodson, 471.
Bunke v. New York Tel. Co., 361.
Bunnell v. Greathead, 461.
Bunten v. Chicago, R. I. & P. R. Co., 578.
Bunting v. Hogsett, 236.
Burch v. Bernard, 337.
Burdick v. Freeman, 247.
Burditt v. Hunt, 170.
Burford v. Wible, 321.
Burgess v. Graffam, 364.
Burk v. Creamery Package Mfg. Co., 36.
Burke v. Fay, 431.
Burke v. Ireland, 216.
Burke v. Smith, 68.
Burke v. State, 208.
Burkett v. Griffith, 74, 420, 422.
Burkett v. Studebaker Bros. Mfg. Co., 520.
Burleson v. Morrisville Lumber & Power Co., 549.
Burnap v. Albert, 479.
Burnard v. Haggis, 161.
Burnett v. Hensley, 406.
Burnett v. Tak, 421.
Burnham v. Dowd, 432, 444.
Burnham v. Pidcock, 371.
Burnham v. Seaverns, 159.
Burns v. Delaware & A. Telegraph & Telephone Co., 16, 181, 192.
Burns v. Grand Rapids & I. R. Co., 247.
Burns v. Jones, 82.
Burns v. Lane, 401.
Burns v. Pethcal, 171, 172.
Burns v. Poulson, 213.
Burns v. Smith, 159.
Buron v. Denman, 108.
Burrill v. Alexander, 504.
Burrill v. Stevens, 398.
Burroughs v. Bayne, 371.
Burrows v. Rhodes, 112.
Burt v. Advertiser Newspaper Co., 325, 326.
Burt v. Bowles, 400.
Burtch v. Nickerson, 309.
Burton v. Fulton, 139.
Burton v. Holley, 365.
Burton v. Scherpf, 360.
Burton v. Tannehill, 381.
Busch v. Wilcox, 413.

[The figures refer to pages]

- Buschman v. Codd, 62.
 Bushnell v. Robeson, 567.
 Bussian v. Milwaukee, L. S. & W. R. Co., 126.
 Bussing v. Rice, 376.
 Busterud v. Farrington, 396.
 Butcher v. Providence Gas Co., 351.
 Butler v. Ashworth, 152.
 Butler v. Chicago, R. I. & P. R. Co., 511.
 Butler v. Frontier Tel. Co., 348.
 Butler v. Hoboken P. & P. Co., 82.
 Butler v. Howe, 129.
 Butler v. Jones, 380.
 Butler v. Watkins, 406.
 Butolph v. Blust, 283.
 Butterfield v. Ashley, 446, 467.
 Butterfield v. Barber, 403.
 Butterfield v. Klaber, 563, 565.
 Butterick Pub. Co. v. Typographical Union, 435, 444.
 Butterman v. McClintic-Marshall Const. Co., 181.
 Buttrick v. Lowell, 235.
 Butts v. J. C. Mackey Co., 221.
 Butts v. Long, 423.
 Byam v. Collins, 335, 336.
 Byard v. Holmes, 74, 396, 417.
 Bybee v. State, 349.
 Byers v. Martin, 295.
 Byers v. Meridian Print Co., 329.
 Byers v. Sansom-Thayer Commission Co., 381.
 Byrd v. Hudson, 340.
 Byrne v. Moore, 491.
 Byrne v. New York Cent. & H. R. R. Co., 505.
 Byxble v. Wood, 27, 119.
- C**
- Cabot v. Christie, 399, 414.
 Cadden v. American Steel Barge Co., 192.
 Cadillac Motor Car Co. v. Johnson, 520.
 Cadle v. McIntosh, 333.
 Cadwell v. Corey, 491.
 Cady v. Brooklyn Union Pub. Co., 314, 316.
 Cahill v. Applegarth, 412.
 Cahill v. Eastman, 515.
 Cahill's Estate, In re, 132.
 Cairnes v. Bleecker, 378.
 Caldwell v. Bennett, 484.
 Caldwell v. Slade, 227.
 Calhoun v. Little, 148.
 Calking v. Baldwin, 40.
 Calkins v. Colburn, 341.
 Callahan v. Hyland, 213.
 Callahan v. Searles, 274, 275.
 Callan v. Bull, 192, 222.
 Callis v. Merriweather, 462.
 Calumet Electric St. R. Co. v. Mable, 129.
 Calwell v. Boone, 200.
 Cameron v. Bryan, 522.
 Cameron v. Oberlin, 217.
 Camp v. Martin, 309.
 Campbell v. Bostick, 333.
 Campbell v. Boyd, 509.
 Campbell v. Chicago, R. I. & P. R. Co., 188.
 Campbell v. Portland Sugar Co., 173.
 Campbell v. Race, 106, 107.
 Campbell v. Seaman, 557, 565, 567, 578, 579.
 Campbell v. Sherman, 139.
 Campbell v. Spottiswoode, 325, 345.
 Campbell v. Stakes, 161.
 Canfield v. W. J. Gould & Co., 382.
 Cannon v. Barry, 389, 390.
 Cannon v. Kinney, 355.
 Capel v. Lyons, 366.
 Capell v. Powell, 166, 167.
 Capital & Counties Bank, Ltd., v. Henty, 345.
 Cardival v. Smith, 490.
 Cardon v. McConnell, 420, 422.
 Cardwell v. McClelland, 403.

[The figures refer to pages]

- | | |
|---|---|
| <p>Carew v. Rutherford, 431.
 Carey v. Berkshire R. Co., 32.
 Carey v. Bilby, 125.
 Carl v. Ayers, 482.
 Carl v. Sheboygan & F. Du L. R. Co., 367.
 Carleton v. Haywood, 166.
 Carleton v. Redington, 569.
 Carli v. Union Depot, S. R. & T. Co., 367.
 Carlisle v. Callahan, 269.
 Carlisle v. Cooper, 43, 574.
 Carnegie v. Great Northern R. Co., 552.
 Carnes v. Atkins Bros. Co., 130.
 Carney v. Brome, 363, 364.
 Carney v. Gleissner, 135.
 Carpenter v. Lewis, 382.
 Carpenter v. Manhattan Life Ins. Co., 10, 385.
 Carpenter v. Walker, 527.
 Carpenter v. Wright, 405.
 Carper v. Receivers of Norfolk & W. R. Co., 37.
 Carr v. Clough, 379.
 Carr v. Hood, 324.
 Carr v. State, 258, 284.
 Carr v. Times, 248, 250.
 Carratt v. Morley, 281.
 Carrol v. Bird, 8.
 Carroll v. Chicago, B. & N. R. Co., 538.
 Carroll v. Chicago, B. & Q. R. Co., 548.
 Carroll v. Mix, 380.
 Carroll v. Staten Island R. Co., 114.
 Carroll v. White, 300.
 Carroll v. Wisconsin Central R. Co., 577.
 Carson v. Hanawalt, 387.
 Carter v. Pitcher, 353.
 Carter v. Towne, 104.
 Caruth v. Allen, 365.
 Cary Bros. & Hannon v. Morrison, 58.
 Casebeer v. Drahoble, 490.</p> | <p>Casement v. Brown, 222.
 Casey v. St. Louis Transit Co., 246.
 Casey v. Sevatson, 482.
 Casey v. Typographical Union No. 3, 442.
 Cassady v. Magher, 165.
 Cassavoy v. Pattison, 310.
 Cassier v. Fales, 279.
 Cassin v. Delany, 166.
 Castle v. Bullard, 396.
 Castle v. Houston, 319.
 Castro v. De Uriarte, 478.
 Caswell v. Parker, 161.
 Cate v. Cate, 46.
 Catlin v. Adirondack Co., 15.
 Catteris v. Cowper, 354.
 Caughey v. Smith, 467.
 Cavanagh v. Durgin, 366, 367.
 Caverly v. McOwen, 527.
 Centaur Co. v. Neathery, 441.
 Centofanti v. Pennsylvania R. Co., 550.
 Central City v. Engle, 462.
 Central Consumers Co. v. Pinkert, 570, 574.
 Central of Georgia R. Co. v. Americus Const. Co., 575.
 Central of Georgia R. Co. v. Chicago Portrait Co., 32.
 Central of Georgia R. Co. v. Price, 102.
 Central R. & Banking Co. v. Smith, 208, 535.
 Central Trust Co. v. East Tennessee, V. & G. R. Co., 15.
 Cerchione v. Hunnewell, 568.
 Certwell v. Hoyt, 471.
 Cervený v. Chicago Daily News Co., 314.
 Cesar v. Karutz, 502.
 Chaddock v. Briggs, 311.
 Chalmers v. Smith, 389.
 Chamberlaine v. Goodwin, 230.
 Chamberlaine v. Willmore, 230.
 Chamberlin v. Fuller, 407.
 Chambers v. Carroll, 91.</p> |
|---|---|

[The figures refer to pages]

- Chambers v. Leiser, 333.
 Chambers v. Robinson, 481.
 Chambers & Marshall v. Baldwin, 452, 453.
 Champion v. Vincent, 365.
 Champion v. Woods, 400, 408.
 Chandler v. Andrews, 417.
 Chandler v. Sanger, 27.
 Channon Co. v. Hahn, 36.
 Chapin v. Holyoke Y. M. C. A., 206.
 Chapleyn of Greye's Inn v. ———, 55, 259, 260.
 Chapman v. Dyett, 278.
 Chapman v. Erie R. Co., 183.
 Chapman v. Rochester, 558.
 Chapman v. State, 256.
 Chapman v. W. F. Epperson Circled Heading Co., 391.
 Charless v. Rankin, 516.
 Charnley v. Shawano Water Power & River Imp. Co., 578.
 Chartered Mercantile Bank v. Netherlands India Steam Nav. Co., 248.
 Chase v. Hodges, 120.
 Chase v. Ingalls, 155.
 Chase v. Whitlock, 316.
 Chasemore v. Richards, 64.
 Chatham Furnace Co. v. Moffatt, 414.
 Chattahoochee Brick Co. v. Braswell, 188.
 Chattanooga, R. & C. R. Co. v. Liddell, 501.
 Chemical Bank v. Lyons, 406.
 Cherry v. Des Moines Leader, 323, 324, 338.
 Cherry v. Lake Drummond Canal & Water Co., 355.
 Chesapeake & O. Canal Co. v. Allegany County Com'rs, 239.
 Chesapeake & O. R. Co. v. Beasley, 530.
 Chesapeake & O. R. Co. v. Burke, 531.
 Chesapeake & O. R. Co. v. De Atley, 470.
 Chesapeake & O. R. Co. v. Hall's Adm'r, 550.
 Chesebro v. Powers, 230, 419.
 Chesko v. Delaware & Hudson Co., 506.
 Chesley v. Brockway, 353.
 Chesley v. King, 69.
 Chester v. Dickerson, 226, 233.
 Chester County v. Brower, 39.
 Chicago Anderson Pressed Brick Co. v. Reinneiger, 186.
 Chicago Board of Trade v. C. B. Thomson Commission Co., 454.
 Chicago Board of Trade v. Christie Grain & Stock Co., 453.
 Chicago Board of Trade v. Had-den-Krull Co., 454.
 Chicago, B. & Q. R. Co. v. Dunn, 134.
 Chicago, B. & Q. R. Co. v. Honey, 552.
 Chicago City R. Co. v. Hennessy, 217.
 Chicago City R. Co. v. Rosenberger, 361.
 Chicago G. W. R. Co. v. First Methodist Episcopal Church of Leavenworth City, Kan., 576.
 Chicago, R. I. & P. R. Co. v. Herring, 272.
 Chicago, R. I. & P. R. Co. v. Houston, 532.
 Chicago, R. I. & P. R. Co. v. Lewis, 125.
 Chicago, R. I. & P. R. Co. v. Thompson, 252.
 Chicago, R. I. & P. R. Co. v. Whitten, 530.
 Chicago, St. L. & N. O. R. Co. v. Packwood, 136, 138.
 Chicago, St. L. & P. R. Co. v. Bills, 500.
 Chicago, St. P., M. & O. Ry. v. Bryant, 211.

[The figures refer to pages]

- | | |
|--|---|
| <p>Chicago, St. P. & K. O. R. Co. v. Pierce, 127.</p> <p>Chicago Union Traction Co. v. Leach, 551.</p> <p>Chicago, W. & V. Coal Co. v. Glass, 559.</p> <p>Chicago, W. & V. Coal Co. v. Moran, 177.</p> <p>Chicago & A. R. Co. v. Bell, 185.</p> <p>Chicago & A. R. Co. v. Suffern, 41.</p> <p>Chicago & A. R. Co. v. Sullivan, 182.</p> <p>Chicago & E. I. R. Co. v. Boggs, 35.</p> <p>Chicago & E. I. R. Co. v. Kneirim, 192.</p> <p>Chicago & E. I. R. Co. v. Rouse, 249.</p> <p>Chidsey v. Canton, 203.</p> <p>Child v. Affleck, 334.</p> <p>Child v. Boston, 200.</p> <p>Child v. Homer, 344.</p> <p>Childers v. San Jose Mercury Printing & Pub. Co., 338.</p> <p>Childs v. Bank of Missouri, 207.</p> <p>Childs v. Kansas City, St. J. & C. B. R. Co., 389.</p> <p>China, The, 210.</p> <p>Chiple v. Atkinson, 446.</p> <p>Chipman v. Palmer, 233.</p> <p>Chittick v. Philadelphia Rapid Transit Co., 255.</p> <p>Chope v. Detroit & H. Plank Road Co., 575.</p> <p>Christensen v. Oregon Short Line R. Co., 539.</p> <p>Christy v. Butcher, 500.</p> <p>Chubbuck v. Cleveland, 404.</p> <p>Chunot v. Larson, 347.</p> <p>Church v. Meeker, 353.</p> <p>Churchill v. Baumann, 115.</p> <p>Churchill v. Holt, 238.</p> <p>Churchill v. Siggers, 494.</p> <p>Churchill v. White, 161.</p> <p>Church of Holy Communion v. Paterson Extension R. Co., 216.</p> | <p>Cincinnati, H. & D. R. Co. v. Kas-sen, 544.</p> <p>Cincinnati, H. & D. R. Co. v. Mc-Mullen, 249.</p> <p>Cincinnati, H. & I. R. Co. v. Ea-ton, 89.</p> <p>Cincinnati, N. O. & T. P. R. Co. v. Blankenship, 505.</p> <p>Cincinnati, N. O. & T. P. R. Co. v. Mealer, 185.</p> <p>Cincinnati, N. O. & T. P. R. Co. v. Rankin, 529.</p> <p>Cincinnati & Z. R. Co. v. Smith, 504.</p> <p>Citizens' Bank of St. Louis v. Tiger Tail Mill & Land Co., 382.</p> <p>Citizens' St. R. Co. v. Robbins, 387.</p> <p>City Council v. Little, 200.</p> <p>City Nat. Bank of Selma v. Burns, 402.</p> <p>City of Anderson v. East, 199, 200.</p> <p>City of Atlanta v. Stewart & Ray, 536.</p> <p>City of Baltimore v. O'Donnell, 220.</p> <p>City of Boston v. Simmons, 581, 583.</p> <p>City of Burlington v. Stockwell, 559.</p> <p>City of Chattanooga v. Reid, 200.</p> <p>City of Chicago v. Babcock, 123, 124.</p> <p>City of Chicago v. McGraw, 134.</p> <p>City of Chicago v. Union Stock Yards & Transit Co., 573.</p> <p>City of Clay Center v. Myers, 395.</p> <p>City of Dixon v. Scott, 63.</p> <p>City of Elgin v. Joslyn, 27.</p> <p>City of Huntsville v. Ewing, 131.</p> <p>City of Indianapolis v. Miller, 573.</p> <p>City of Joliet v. Harwood, 216, 217.</p> |
|--|---|

[The figures refer to pages]

- City of Joliet v. Shufeldt, 97.
 City of Kewanee v. Otley, 575.
 City of Lafayette v. Timberlake, 200.
 City of Lanark v. Dougherty, 542.
 City of London v. Bolt, 558.
 City of Lowell v. Spaulding, 568.
 City of Macon v. Holcomb, 542.
 City of Memphis v. Kimbrough, 201.
 City of Milwaukee v. Herman Zoehrlaut Leather Co., 136.
 City of New York v. Bailey, 513.
 City of New York v. Lord, 106, 107.
 City of Pekin v. McMahon, 505, 506.
 City of Peoria v. Simpson, 227.
 City of Philadelphia v. Gavagnin, 201.
 City of Philadelphia v. Gilmar-tin, 201.
 City of Pittsburgh v. Grier, 201.
 City of Quincy v. Jones, 516.
 City of Richmond v. Smith, 577.
 City of Roanoke v. Shull, 554.
 City of Rochester v. Campbell, 39.
 City of Rochester v. West, 109, 110.
 City of Tiffin v. McCormack, 217, 515.
 City of Valparaiso v. Bozarth, 558.
 City of Waterloo v. Waterloo, C. F. & N. R. Co., 558.
 City of Waycross v. Houk, 574.
 City of Wyandotte v. Agan, 462.
 City & S. R. Co. of Savannah v. Brauss, 15.
 Clancy v. Barker, 16, 214.
 Clancy v. Byrne, 227, 568.
 Clark v. Bayer, 468, 471, 472.
 Clark v. Brown, 341.
 Clark v. Buckmobile Co., 211.
 Clark v. Carroll, 118.
 Clark v. Chambers, 88, 89.
 Clark v. Clark, 446.
 Clark v. Cleveland, 490.
 Clark v. Com., 261.
 Clark v. Creitzburgh, 294.
 Clark v. Downing, 257.
 Clark v. Draper, 382.
 Clark v. Edgar, 404.
 Clark v. E. I. Du Pont de Nem-ours Powder Co., 526.
 Clark v. Hale, 379.
 Clark v. Heath, 540.
 Clark v. Holdridge, 61.
 Clark v. Keliber, 364.
 Clark v. Lake St. Clair & N. U. R. Ice Co., 572.
 Clark v. Lovering, 170.
 Clark v. May, 147.
 Clark v. Miller, 139.
 Clark v. Molyneux, 339.
 Clark v. Patapsco Guano Co., 236.
 Clark v. Raleigh & G. R. Co., 114.
 Clark v. Ralls, 398.
 Clark v. St. Paul & S. C. R. Co., 187.
 Clark v. Spicer, 149.
 Clark v. Wiles, 346.
 Clark v. Wilson, 153.
 Clark Co. v. Mt. Morris Bank, 24.
 Clarke, The Stacey, 272.
 Clarke v. Connecticut Co., 552.
 Clarke v. May, 155.
 Clarke v. Rochester & S. R. Co., 530.
 Clarke's Adm'r v. Louisville & N. R. Co., 524.
 Clarkson v. Laiblan, 448.
 Clasen v. Pruhs, 132.
 Clausen v. Tjernagel, 416.
 Clavin v. Froelich, 312.
 Clay v. Waters, 231.
 Cleary v. Municipal Electric Light Co., 126.
 Clemence v. Steere, 390, 391.
 Clemens v. Belford, Clark & Co., 291.
 Clemens v. Speed, 516, 517.
 Clement v. Wheeler, 392.
 Clements v. Yturria, 381, 382.

[The figures refer to pages]

- | | |
|--|--|
| <p>Clementson v. Minnesota Tribune Co., 343.</p> <p>Cleveland v. Citizens' Gaslight Co., 563.</p> <p>Cleveland, C., C. & St. L. R. Co. v. Jenkins, 8.</p> <p>Cleveland, C. & C. R. Co. v. Crawford, 533.</p> <p>Cleveland Leader Printing Co. v. Nethersole, 420, 421.</p> <p>Clifford v. Brandon, 584.</p> <p>Clifton v. Lange, 324.</p> <p>Clinton v. Brooklyn Heights R. Co., 525.</p> <p>Clinton v. Myers, 59, 66.</p> <p>Clinton E. Worden & Co. v. California Fig Syrup Co., 112.</p> <p>Cloon v. Gerry, 485.</p> <p>Closson v. Staples, 479.</p> <p>Clouser v. Clapper, 460.</p> <p>Clow v. Plummer, 373.</p> <p>Clutterbuck v. Chaffers, 297.</p> <p>Coale v. Hannibal & St. J. R. Co., 392.</p> <p>Coates v. Chapman, 189, 190.</p> <p>Cobb v. Massachusetts Chemical Co., 574.</p> <p>Cobb v. Peters, 411.</p> <p>Cochran v. Melendy, 314.</p> <p>Cocke v. Greene, 402.</p> <p>Cockerham v. Nixon, 522.</p> <p>Codrington v. Lloyd, 279.</p> <p>Cody v. New York & N. E. R. Co., 90.</p> <p>Coe, In re, 245.</p> <p>Cœur d'Alene Lumber Co. v. Thompson, 506.</p> <p>Coffey v. Myers, 480.</p> <p>Coffin v. Field, 40.</p> <p>Coggs v. Bernard, 17, 46.</p> <p>Coggswell v. Baldwin, 58.</p> <p>Cohen v. Minzesheimer, 422.</p> <p>Cohen v. Nathaniel Fisher & Co., 581.</p> <p>Cohen v. New York, 89, 202, 562.</p> <p>Cohoon v. Chicago, B. & Q. R. Co., 37.</p> | <p>Cointement v. Cropper, 487.</p> <p>Colby v. Jackson, 286.</p> <p>Colby v. Reynolds, 314, 315.</p> <p>Colden v. Eldred, 40.</p> <p>Cole v. Curtis, 482, 487.</p> <p>Cole v. Fisher, 352.</p> <p>Cole v. Groves, 247.</p> <p>Cole v. Turner, 257.</p> <p>Cole v. Warren Mfg. Co., 180.</p> <p>Cole v. Wilson, 336.</p> <p>Coleman v. Fire Ins. Patrol of New Orleans, 205.</p> <p>Coleman v. MacLennan, 337.</p> <p>Colgate v. Hill, 475.</p> <p>Colgrove v. Smith, 218.</p> <p>Collard v. Beach, 247.</p> <p>Collier v. Hicks, 272.</p> <p>Collins v. American News Co., 440.</p> <p>Collins v. Cronin, 584.</p> <p>Collins v. Denison, 62.</p> <p>Collins v. Renison, 263.</p> <p>Collum v. Turner, 481.</p> <p>Colorado Mortg. & Inv. Co. v. Giacomini, 502.</p> <p>Colorado Springs & I. R. Co. v. Nichols, 462.</p> <p>Colorado & S. R. Co. v. Webb, 524.</p> <p>Colt v. McMechen, 529.</p> <p>Colter v. Lower, 477.</p> <p>Colton v. Onderdonk, 350.</p> <p>Colvin v. Holbrook, 172.</p> <p>Colyer v. Richard K. Fox Pub. Co., 289.</p> <p>Combs v. Rockingham County Com'rs, 359.</p> <p>Comer v. Knowles, 273.</p> <p>Comer v. Taylor, 472.</p> <p>Comes v. Cruce, 296.</p> <p>Commercial Bank of Albany v. Ten Eyck, 74.</p> <p>Commissioners of Hancock County v. Bank of Findley, 89.</p> <p>Com. v. Alger, 109.</p> <p>Com. v. Anthes, 345.</p> <p>Com. v. Blanding, 329.</p> |
|--|--|

[The figures refer to pages]

- Com. v. Boston, 575.
 Com. v. Brickett, 285.
 Com. v. Carlisle, 430.
 Com. v. Clark, 263.
 Com. v. Collberg, 116.
 Com. v. Donahue, 265.
 Com. v. Eastman, 582.
 Com. v. Edwards, 582.
 Com. v. Hersey, 5.
 Com. v. Hunt, 429, 430.
 Com. v. Lynn, 267.
 Com. v. Malone, 262.
 Com. v. Pear, 109.
 Com. v. Randall, 271.
 Com. v. Stratton, 258.
 Com. v. Upton, 567.
 Com. v. Wardwell, 324.
 Com. v. White, 256.
 Commonwealth Electric Co. v. Rose, 535.
 Comparet v. Burr, 372.
 Conard v. Pacific Ins. Co., 367.
 Conaughty v. Nichols, 32.
 Condict v. Jersey City, 201.
 Conelly v. Nashville, 201.
 Congress & E. Spring Co. v. Edgar, 58, 521.
 Congreve v. Smith, 562.
 Conhocton Stone Road v. Buffalo, N. Y. & E. R. Co., 569, 570.
 Conklin v. R. P. & J. H. Staats, 20.
 Conklin v. Thompson, 157.
 Conlan v. Roemer, 401.
 Conlon v. Cassidy, 116.
 Conly v. Conly, 118.
 Connecticut Mut. Life Ins. Co. v. New York & N. H. R. Co., 20.
 Connell v. Reed, 112.
 Connell v. Western Union Tel. Co., 86.
 Connelly v. Western Union Tel. Co., 86.
 Connelly v. Woods, 148.
 Conner v. Standard Pub. Co., 319, 328.
 Conner v. Woodfill, 346.
 Conners v. Loker, 363.
 Connett v. United Hatters, 435.
 Connolly v. Knickerbocker Ice Co., 114.
 Connor v. Hillier, 372.
 Conrad v. Joseph Uhrig Brewing Co., 440.
 Consolidated Coal Co. of St. Louis v. Haenni, 187.
 Consolidated Ice Mach. Co. v. Kelfer, 207, 236.
 Constitution Pub. Co. v. Way, 294.
 Continental Store Service Co. v. Clark, 38.
 Contos & Metracas v. Jamison & Morris, 551.
 Converse v. Walker, 508.
 Conway v. Furst, 187.
 Conway v. Reed, 158.
 Cook v. Bartlett, 472.
 Cook v. Champlain Transp. Co., 543.
 Cook v. Globe Printing Co. of St. Louis, 314.
 Cook v. Gregg, 362.
 Cook v. Hastings, 283.
 Cook v. Hopper, 234.
 Cook v. Howard, 356.
 Cook v. Rief, 296.
 Cook v. St. Paul, M. & M. R. Co., 192.
 Cook v. Thornton, 355.
 Cooke v. Bangs, 148, 149.
 Cooley v. Galyon, 327.
 Coombe v. Sansom, 385.
 Coon v. Atwell, 399.
 Coons v. Chrystie, 432.
 Cooper v. Armour, 480.
 Cooper v. Central R. of Iowa, 184.
 Cooper v. Chitty, 371.
 Cooper v. Cooper, 28, 29.
 Cooper v. Greeley, 300, 321.
 Cooper v. Lawson, 329.
 Cooper v. Lovering, 415.
 Cooper v. McKenna, 272.

[The figures refer to pages]

- Cooper v. Newell, 360.
Cooper v. North Carolina R. Co., 532.
Cooper v. Reynolds, 144.
Cooper v. Stone, 324.
Cooper v. Utterbach, 487.
Cooper v. Witham, 167.
Copley v. Wills, 521.
Copp v. Williams, 153.
Coppage v. State, 429.
Coppins v. New York Cent. & H. R. Co., 182.
Corbett v. St. Vincent's Industrial School of Utica, 204, 205.
Corbett v. Twenty-Third St. R. Co., 120.
Corbin v. Huntington, 462.
Corbin v. Philadelphia, 90, 551.
Corcoran v. Harran, 260.
Corey v. Havener, 232, 236.
Corliss v. E. W. Walker Co., 288, 290.
Corliss v. Keown, 170.
Cornell v. Huber, 41.
Cornellier v. Haverhill Shoe Manufacturers' Ass'n, 432, 433, 583.
Corr v. Sun Printing & Pub. Ass'n, 304.
Corrick v. Dunham, 458, 459.
Corsair, The, 44.
Corthell v. Holmes, 571.
Cory v. Board of Chosen Freeholders of Somerset County, 27.
Cory v. Little, 363.
Cosgrove v. Ogden, 547.
Costello v. Third Ave. R. Co., 547, 548.
Costenbader v. Shuman, 356.
Cotes & Patchin v. Davenport, 369.
Cotton v. U. S., 135.
Cottrill v. Krum, 409.
Cotzhausen v. Simon, 413.
Couch v. Steel, 35.
Coughtry v. Globe Woolen Co., 178, 189.
Coulter v. American Merchants' Union Exp. Co., 90.
Countess of Shrewsbury's Case, 392.
Count Joannes v. Bennett, 335.
Count Joannes v. Burt, 308, 316.
County v. Pacific Coast Borax Co., 38.
Coupe v. Platt, 509.
Courler Journal Co. v. Phillips, 319.
Courvoisier v. Raymond, 259.
Covell v. Laming, 46.
Covert v. Gray, 472.
Covington Street R. Co. v. Packer, 472.
Covington & C. Bridge Co. v. Steinbrock, 216, 217, 220.
Coward v. Baddeley, 257.
Cowen v. Sunderland, 502.
Cowley v. Pulsifer, 329.
Cowley v. Smyth, 63, 405, 411, 416.
Cox v. Lee, 345.
Cox v. Pennsylvania R. Co., 103.
Coxe v. Robbins, 40.
Coxe v. Wirrall, 492.
Coxhead v. Richards, 335, 336.
Craft v. Parker, Webb & Co., 518.
Cragg v. Arendale, 27.
Cragle v. Hadley, 207.
Cragin v. Lovell, 240.
Craig v. Brown, 309.
Craig v. Charleston, 200.
Craig v. Gilbreth, 355.
Craig v. Hamilton, 406.
Craker v. Chicago & N. W. R. Co., 82, 214.
Cramer v. Riggs, 316.
Crane v. Elder, 416.
Crane v. Mason, 364.
Crashley v. Press Pub. Co., 241, 302.
Crater v. Binninger, 417.
Craufurd's Adm'r v. Smith's Ex'r, 385.
Craven v. Bloomingdale, 212.

[The figures refer to pages]

- Crawford v. Maxwell, 358.
 Crawford v. Mellton, 304.
 Crawford v. State, 263.
 Cray v. Hartford Fire Ins. Co., 127.
 Credit v. Brown, 364.
 Cregan v. Marston, 181.
 Cregin v. Brooklyn Crosstown R. Co., 119.
 Cribbs v. Yore, 82.
 Crimmins v. Armstrong Transfer Exp. Co., 534.
 Criner v. Pike, 356, 368.
 Crispin v. Babbitt, 192.
 Critten v. Chemical Nat. Bank, 31.
 Crocker v. Crocker, 464.
 Crocker v. Hadley, 315.
 Crommelin v. Coxe & Co., 569.
 Crompton v. Beedle, 409.
 Crook v. Pitcher, 241.
 Crosby v. Leng, 7.
 Crosby v. People, 5.
 Crosland v. Pottsville, 573.
 Cross v. Andrews, 162.
 Cross v. Grant, 460.
 Cross v. Kent, 162.
 Crosson v. Olson, 154.
 Crow v. Manning, 167.
 Crowe v. Wilson, 389.
 Crowell v. Jackson, 402.
 Crowhurst v. Amersham Burial Board, 515.
 Crown v. Orr, 187.
 Cruikshank v. Gordon, 308.
 Cruiser v. State, 268.
 Cubit v. O'Dett, 67.
 Cuddy v. Horn, 231.
 Cuff v. Newark & N. Y. R. Co., 217, 218, 219.
 Cullen v. O'Hara, 372.
 Culmer v. Wilson, 168, 238.
 Cumberland Glass Mfg. Co. v. De Witt, 450, 456.
 Cumberland Glass Mfg. Co. v. Glass Bottle Blowers' Ass'n, 435.
 Cumberland & Oxford Canal Corp. v. Hitchings, 40.
 Cumberland & P. R. Co. v. State to Use of Fazenbaker, 532.
 Cuming v. Brooklyn City R. Co., 467, 468, 471, 472.
 Cummings v. Cass, 399.
 Cunningham v. Brown, 476.
 Cunningham v. Underwood, 337.
 Curley v. Feeney, 303.
 Curley v. Harris, 121, 123.
 Curme, Dunn & Co. v. Rauh, 376.
 Curran v. A. H. Stange Co., 188.
 Curran v. Galen, 432, 449.
 Curran v. Lewiston, A. & W. R. Co., 555.
 Curran v. Olson, 17.
 Currie v. Seaboard Air Line R. Co., 529.
 Curry v. Mannington, 118.
 Curtice v. Thompson, 570.
 Curtin v. Somerset, 20.
 Curtin v. Western Union Tel. Co., 86.
 Curtis v. Kiley, 220.
 Curtis v. Mussey, 325.
 Cusick v. Adams, 509.
 Cuthbert v. Galloway, 487.
 Cutler v. State, 254.
 Cutts v. Spring, 354.
- D**
- Daggett v. Davis, 372.
 Dailey v. Houston, 166.
 Dain v. Wycoff, 470.
 Daingerfield v. Thompson, 230.
 Daisey v. Hudson, 353.
 Dale v. Harris, 334.
 Dallas v. Koehler Sporting Goods Co., 27.
 Dalrymple v. Craig, 400.
 D'Altomonte v. New York Herald Co., 289.
 Dalton v. Angus, 517.
 Daly v. Cornwell, 451.
 Daly v. Everett Pulp & Paper Co., 470.

[The figures refer to pages]

- | | |
|--|---|
| <p>Dame v. Kenney, 341.
 Dampert v. Sympson, 476.
 Dana v. Valentine, 575, 578.
 Dand v. Sexton, 352.
 Danforth v. Cushing, 74, 416.
 Daniels v. Ballantine, 81.
 Daniels v. New York & N. E. R. Co., 507.
 Danielson v. Roberts, 382.
 Danskin v. Pennsylvania R. Co., 533, 554.
 Danville, H. & W. R. Co. v. Com., 576.
 Darbrinsky v. Pennsylvania Co., 553.
 Darling v. Clement, 309, 311.
 Darlington v. New York, 201.
 Darmstaetter v. Moynahan, 220.
 Dashaway Ass'n v. Rogers, 27.
 Dashiel v. Harshman, 401.
 Dauphiny v. Buhne, 322.
 Davenport v. Richmond City, 110.
 David v. Moore, 409.
 David v. Park, 409.
 David v. West Jersey & S. R. Co., 548.
 Davidson v. Cornell, 187.
 Davidson v. Goodall, 471.
 Davidson v. Jordan, 415.
 Davidson v. Oakes, 456.
 Davie v. Levy, 219.
 Davie v. Wisher, 483.
 Davies v. Gardiner, 313.
 Davies v. L. & P. M. Ins. Co., 410.
 Davies v. McKnight, 33, 80.
 Davies v. Mann, 543, 544, 545.
 Davies v. Snead, 336.
 Davis v. Campbell, 364.
 Davis v. Carey, 306.
 Davis v. Central Congregational Soc. of Jamaica Plain, 508.
 Davis v. Central Land Co., 410.
 Davis v. Crisham, 539.
 Davis v. Guarneri, 518.
 Davis v. Hearst, 342.
 Davis v. John Breuner Co., 533.</p> | <p>Davis v. McMillan, 483, 484, 489.
 Davis v. Mercer Lumber Co., 35, 194.
 Davis v. Minor, 49.
 Davis v. Nash, 353, 355.
 Davis v. New York Cent. & H. R. R. Co., 532.
 Davis v. New York & N. E. R. Co., 251.
 Davis v. Niagara Falls Tower Co., 515.
 Davis v. Sawyer, 558, 563.
 Davis v. Shepstone, 325.
 Davis v. Snyder Tp., 99.
 Davis v. Standard Nat. Bank, 23, 24, 25.
 Davis v. Starrett, 299.
 Davis v. Summerfield, 216, 217.
 Davis v. Tacoma Ry. & Power Co., 61.
 Davis' Adm'r v. Ohio Valley Banking & Trust Co., 504.
 Davis Mach. Co. v. Robinson, 431.
 Davis & Son v. Hurt, 373.
 Davison v. Duncan, 330.
 Davison v. People, 263, 264.
 Dawe v. Morris, 13, 31, 397.
 Dawkins v. Rokeby, 327.
 Day v. Bream, 300.
 Day v. Day, 572.
 Day v. Hunnicutt, 455.
 Deagan v. Weeks, 262.
 Dean v. Brock, 173.
 Dearborn v. Dearborn, 46.
 De Armond v. Armstrong, 320.
 Debbins v. Old Colony R. Co., 533.
 Decker v. Gammon, 347.
 Decker v. Mathews, 372.
 De Courcey v. Cox, 147.
 De Ford v. Johnson, 463.
 De Forrest v. Wright, 215.
 De Gloppe v. Nashville Ry. & Light Co., 539.
 De Grasse v. Verona Min. Co., 408.</p> |
|--|---|

[The figures refer to pages]

- Degraw v. Elmore, 31.
 De Gray v. Murray, 521.
 De Haber v. Portugal, 198.
 Dehm v. Hinman, 282.
 Dekle v. Calhoun, 383.
 Delacroix v. Thevenot, 297.
 De Laney v. Georgia, C. & N. R. Co., 569.
 Delaney v. Rochereau, 173.
 Delano v. Smith, 389.
 Delaware, L. & W. R. Co. v. Devore, 554.
 Delaware, L. & W. R. Co. v. Frank, 454.
 Delaware, L. & W. R. Co. v. Reich, 507.
 Delaware, L. & W. R. Co. v. Salmon, 96, 543.
 Delaware, L. & W. R. Co. v. Trautwein, 114.
 Delaware & H. Canal Co. v. Torrey, 72.
 Delegal v. Highley, 484.
 De Libellis Famosis Case, 293.
 Dells v. Stollenwerk, 213.
 Delz v. Winfree, 437, 438, 581.
 De Marentille v. Oliver, 257.
 Demarest v. Wynkoop, 129.
 Deming v. Darling, 398.
 Deming v. Terminal R. Co. of Buffalo, 218, 220.
 De Minico v. Craig, 431.
 Dempsey v. Chambers, 234.
 Denison v. Lincoln, 99.
 Dennehey v. Woodsum, 485.
 Denner v. Chicago, M. & St. P. R. Co., 575.
 Dennick v. Central R. Co. of New Jersey, 245.
 Denning v. State, 2.
 Dennis v. Clark, 468, 472.
 Dennis v. Larkin, 34.
 Dennis v. Ryan, 481.
 Denny v. Denny, 360.
 Denny v. Gilman, 410.
 Denny v. Manhattan Co., 172.
 Denny v. New York Cent. R. Co., 81.
 Denson v. Georgia Ry. & Electric Co., 526.
 Dent & Cade v. Chiles, 380.
 Denton v. Great Northern Ry., 405.
 Denver City Tramway Co. v. Brown, 554.
 Denver City Tramway Co. v. Cobb, 545.
 Denver & R. G. R. Co. v. Buffehr, 544.
 Denver & R. G. Ry. v. Harris, 207.
 Denver & R. G. R. Co. v. Young, 462.
 De Pew v. Robinson, 308, 309.
 Derry v. Peek, 411, 413, 414, 415.
 De S. v. De S., 254.
 De Severinus v. New York Evening Journal Pub. Co., 343.
 De Severinus v. Press Pub. Co., 343.
 Des Jardins v. Thunder Bay River Boom Co., 354.
 Deupree v. Thornton, 584.
 Develing v. Sheldon, 280.
 Devereux v. Barclay, 374.
 Devlin v. Snellenburg, 355.
 Devoe v. Brandt, 397.
 Devoe v. New York Cent. & H. R. Co., 184.
 De Wolf v. Ford, 16, 214.
 Dexter v. Cole, 62, 352.
 Dexter v. Taber, 308.
 Deyo v. Van Valkenburgh, 279.
 Dickenson v. Watson, 54.
 Dickerson v. Schwabacher, 495.
 Dickinson v. Atkins, 30.
 Dickinson v. Barber, 163.
 Dickinson v. Stuart Colliery Co., 553.
 Diemer v. Herber, 485.
 Diener v. Star-Chronical Pub. Co., 323.

[The figures refer to pages]

- Dietrich v. Northampton, 132.
 Dietrichs v. Schaw, 282.
 Dillard v. Collins, 336.
 Dillenberger v. Weingartner, 186.
 Dillman v. Nadlehoffer, 400.
 Dimauro v. Linwood St. R. Co., 524.
 Dimock v. United States Nat. Bank, 387.
 Dimuria v. Seattle Transfer Co., 533.
 Dirks Trust & Title Co. v. Koch, 402.
 Disbrow v. Westchester Hardwood Co., 366.
 Dishaw v. Wadleigh, 494, 495.
 Distin v. Rose, 322.
 Divens v. Meredith, 312.
 Diversey v. Smith, 246.
 Dixie Fire Ins. Co. v. Betty, 343.
 Dixon v. Bell, 229, 526.
 Dixon v. Brooklyn City & N. R. Co., 125.
 Dixon v. Clow, 71.
 Dixon v. New York, N. H. & H. R. Co., 550.
 Dixon v. Swift, 508.
 Doan v. Kelley, 804.
 Doane v. Covell, 446.
 Dodd v. Spartanburg Ry., Gas & Electric Co., 547.
 Dodge v. Burlington, C. R. & N. R. Co., 35.
 Dodge v. Colby, 240, 419.
 Dodge Co. v. Construction Information Co., 453.
 Doe v. Roe, 466.
 Doellner v. Tynan, 566.
 Doering v. State, 284.
 Doing v. New York, O. & W. R. Co., 184.
 Dole v. Erskine, 261.
 Dollard v. Roberts, 502.
 Domm v. Hollenbeck, 521, 522.
 Donaghue v. Gaffy, 317.
 Donahoe v. Richards, 150.
 Donahoe v. Star Pub. Co., 320, 325.
 Donahue v. Kelly, 56.
 Donahue v. Keystone Gas Co., 350.
 Donahue v. Shippee, 373.
 Donnelly v. Boston Catholic Cemetery Ass'n, 206.
 Donnelly v. Daggett, 486.
 Donnelly v. Harris, 260.
 Donnelly v. Jackson Bros., 450.
 Donovan v. New Orleans Ry. & Light Co., 539.
 Dooling v. Budget Pub. Co., 74, 420.
 Doolittle v. Sherman & Shaw, 378.
 Doran v. Smith, 160.
 Doremus v. Hennessy, 453, 455, 581.
 Dorman v. Ames, 72.
 Dorr v. U. S., 329.
 Dorr Cattle Co. v. Des Moines Nat. Bank, 244.
 Dougherty v. Stepp, 61, 71, 346.
 Douglas v. Allen, 490.
 Douglas v. Stokes, 291.
 Douglass v. Barber, 283.
 Douglass v. Richards, 418.
 Dow v. Sanborn, 397.
 Dowd v. Erie R. Co., 188.
 Dowd v. Wadsworth, 380.
 Dowie v. Priddle, 345.
 Dowling v. Livingstone, 323, 324.
 Downes v. Harper Hospital, 204, 205.
 Downey v. Finucane, 404, 414.
 Downing v. Stone, 486.
 Downs v. Finnegan, 27.
 Doyle v. Kirby, 316.
 Doyle v. New York, O. & W. R. Co., 123.
 Doyley v. Roberts, 313.
 Drake v. Hagan, 173.
 Drake v. Redington, 383.
 Drake v. State, 345.
 Draper v. Baker, 257.
 Draper v. Stouvenel, 134.

[The figures refer to pages]

Dreier v. McDermott, 555.
 Drennan v. Grady, 362, 510.
 Dreyfus v. Aul, 490.
 Drohan v. Lake Shore & M. S. R. Co., 126.
 Drown v. Northern Ohio Traction Co., 545.
 Drown v. Smith, 390.
 Drum v. Miller, 79.
 Druse v. Wheeler, 365.
 Du Bois v. Decker, 17.
 Dubuc de Marentille v. Oliver, 352.
 Duck v. Mayew, 125.
 Duckett v. Pool, 446.
 Dudley v. Hawley, 377.
 Dudley v. Kennedy, 561.
 Dudley v. Love, 226.
 Dudley v. Mahew, 38.
 Duffany v. Ferguson, 400.
 Duffee v. Boston El. R. Co., 134.
 Duffles v. Duffles, 464, 465.
 Duffy v. McKenna, 417.
 Duffy v. New York Evening Post Co., 323.
 Dufresne v. Hutchinson, 378.
 Duke v. Harper, 497.
 Duke of Somerset v. Cookson, 360.
 Dukes v. Eastern Distilling Co., 570.
 Dulieu v. White, 85.
 Dumont v. Smith, 358.
 Dunbar v. City Council of Augusta, 110.
 Duncan v. Griswold, 423.
 Duncan v. Spear, 382.
 Duncombe v. Felt, 392.
 Dundee Mortgage & Trust Inv. Co. v. Hughes, 152.
 Dunham v. Powers, 326.
 Dunn v. Burleigh, 111.
 Dunshee v. Standard Oil Co., 437, 441.
 Du Pre v. Williams, 360.
 Durden v. Barnett & Harris, 468.
 Durkin v. Kingston Coal Co., 171, 210.
 Duryea v. Zimmerman, 406, 416.

Dusenbury v. Kelley, 130.
 Dustin v. Cowdry, 270.
 Dustin v. Curtis, 14.
 Dusy v. Helm, 149, 279.
 Dutro v. Wilson, 369.
 Dwight v. Brewster, 528.
 Dwinelle v. New York Cent. & H. R. R. Co., 214.
 D. Wolff & Co. v. Lozier, 167, 168.
 Dyckman v. Vallente, 377.
 Dyer v. Erie R. Co., 552.
 Dyk v. De Young, 257.

E

Eachus v. Trustees of Illinois & M. Canal, 241.
 Eager v. Com., 129.
 Eaglesfield v. Marquis of Londonderry, 400.
 Earle v. Holderness, 385.
 Earl of Leicester v. Walter, 342.
 Easley v. Moss, 334.
 East v. Worthington, 399.
 Eastern Counties R. Co. v. Broom, 235.
 Eastern States Retail Lumber Dealers' Ass'n v. U. S., 438.
 Eastern Trust & Banking Co. v. Cunningham, 402.
 Eastin v. Bank of Stockton, 479.
 East Jersey Water Co. v. Bigelow, 73, 567.
 Eastland v. Caldwell, 321.
 Eastman v. Keasor, 486.
 Eastman v. Meredith, 203.
 East River Gaslight Co. v. Donnelly, 150, 151.
 East Tennessee V. & G. R. Co. v. Lockhart, 89.
 Eastwood v. Holmes, 294.
 Eaton v. Boston & L. R. Co., 98.
 Eaton v. European & N. A. R. Co., 223.
 Eaton v. Hill, 161.
 Eaton v. New York Cent. & H. R. R. Co., 538.

[The figures refer to pages]

- | | |
|--|--|
| <p>Eaton, Cole & Burnham Co. v. Avery, 404.</p> <p>Ebersole v. Fields, 421.</p> <p>Eckert v. Long Island R. Co., 90, 550.</p> <p>Eckert v. Pennsylvania R. Co., 16.</p> <p>Eckert v. Peters, 361.</p> <p>Eckes v. Stetler, 508.</p> <p>Eckstein v. Frank, 160, 161.</p> <p>Economopoulos v. A. G. Pollard Co., 297.</p> <p>Eddy v. Ellicottville, 200.</p> <p>Edelman v. Yeakel, 358.</p> <p>Edens v. Fletcher, 125.</p> <p>Edgerly v. Concord, 201.</p> <p>Edgington v. Burlington, C. R. & N. R. Co., 506.</p> <p>Edington v. Fitzmaurice, 397.</p> <p>Edison v. Edison Polyform & Mfg. Co., 289, 290.</p> <p>Edmonston v. Birch & Co., 338.</p> <p>Edsall v. Brooks, 329.</p> <p>Edson v. Hudson, 397.</p> <p>Edward Malley Co. v. Button, 403.</p> <p>Edwards v. Kevill, 333.</p> <p>Edwards v. Wessinger, 166.</p> <p>E. E. Bolles Wooden Ware Co. v. U. S., 136.</p> <p>Egbert v. Greenwalt, 459.</p> <p>Eggett v. Allen, 484.</p> <p>Ehle v. Quackenboss, 354.</p> <p>Ehrgott v. New York, 77, 79, 80, 100, 103.</p> <p>Elfert v. Sawyer, 342.</p> <p>Elghmy v. Union Pac. R. Co., 205.</p> <p>Eingartner v. Illinois Steel Co., 241, 244, 248.</p> <p>Einstein v. Dunn, 155, 387.</p> <p>Einstein v. Marshall, 412.</p> <p>Elder v. Morrison, 282.</p> <p>Elder & Co. v. Shoffstall, 417.</p> <p>Eldred v. Mackie, 222.</p> <p>Eldred v. Oconto Co., 375.</p> <p>Eldridge v. Atlas S. S. Co., 188.</p> | <p>Eldridge v. Hoefer, 388.</p> <p>Ellenwood v. Marietta Chair Co., 242.</p> <p>Eller v. Koehler, 565.</p> <p>Ellington v. Bennett, 72.</p> <p>Ellington v. Ellington, 469.</p> <p>Elliotson v. Feetham, 578.</p> <p>Elliott v. Boyles, 343.</p> <p>Elliott v. Brown, 261.</p> <p>Elliott v. Hayden, 237.</p> <p>Elliott v. Herz, 522.</p> <p>Ellis v. Andrews, 398.</p> <p>Ellis v. Bitzer, 122, 124.</p> <p>Ellis v. Brockton Pub. Co., 343.</p> <p>Ellis v. Cleveland, 115.</p> <p>Ellis v. Esson, 123.</p> <p>Ellis v. Hurst, 291.</p> <p>Ellis v. Kimball, 294.</p> <p>Ellis v. Lake Shore & M. S. R. Co., 533.</p> <p>Ellis v. Loftus Iron Co., 348.</p> <p>Ellis v. McNaughton, 173, 174.</p> <p>Ellis v. Newbrough, 407.</p> <p>Ellis v. Sheffield Gas Consumers Co., 216.</p> <p>Ellis v. Southern R. Co., 172.</p> <p>Elmer v. Fessenden, 87, 299.</p> <p>Elmer v. Locke, 194.</p> <p>Elvins v. Delaware & A. Telegraph & Telephone Co., 369.</p> <p>Elwell v. Burnside, 389.</p> <p>Ely v. Board of Sup'rs of Niagara County, 573.</p> <p>Emerson v. Lowell Gas Light Co., 351.</p> <p>Emery v. Hapgood, 278.</p> <p>Emmerich v. Thorley, 286.</p> <p>Emmerson v. Fay, 218.</p> <p>Emmerson v. Hutchinson, 398.</p> <p>Emmett v. Lyne, 274.</p> <p>Emmons v. Alvord, 16.</p> <p>Emmons v. Pottle, 299.</p> <p>Emmons v. Stevane, 521, 522.</p> <p>Empire Gold Mining Co. v. Bonanza Gold Mining Co., 346, 366.</p> <p>Employing Printers' Club v. Doctor Blosser Co., 446, 448.</p> |
|--|--|

[The figures refer to pages]

- Enfield v. Colburn**, 406, 407.
Engel v. Eureka Club, 216, 217.
Engle v. Jones, 365.
Englert v. New Orleans Ry. & Light Co., 170.
Ensor v. Bolgiano, 446.
Erd v. Chicago & N. W. R. Co., 543.
Erdman v. Mitchell, 431, 432.
Erie City Iron Works v. Barber & Co., 207.
Erie City Pass. R. Co. v. Schuster, 554.
Ernst v. Hudson River R. Co., 35.
Ertz v. Produce Exch., 438.
Esterly Harvesting Mach. Co. v. Berg, 397.
Estes v. Missouri Pac. R. Co., 64, 90.
Esty v. Baker, 348.
Esty v. Wilmot, 357.
Eugene F. Morgan, The, 542.
Evans v. Cleveland, 117.
Evans v. Davidson, 213.
Evans v. Evans, 460.
Evans v. Fitchburg R. Co., 529.
Evans v. Iowa City, 200.
Evans v. Kymer, 372.
Evans v. Waite, 116.
Evansville & C. R. Co. v. Dick, 576.
Evansville & C. R. Co. v. Wolf, 553.
Evansville & T. H. R. Co. v. Guyton, 182.
Evenson v. Spaulding, 441.
Everett v. Henderson, 278, 280.
Everett v. Hydraulic Flume Tunnel Co., 513.
Everett v. Sherfey, 467.
Everett Waddey Co. v. Richmond Typographical Union, 430, 434, 435.
Everhart v. Terre Haute & I. R. Co., 176.
Everist v. Drake, 398.
Evers v. Krouse, 213.
Ewald v. Chicago & N. W. R. Co., 178.
Ewan v. Lippincott, 189.
Ewing v. Louisville, 574.
Ewing v. Sanford, 485.
Exchange, The, v. McFaddon, 198.
Exchange Tel. Co. v. Gregory, 454.
Express Printing Co. v. Copeland, 323.
Eyre v. Garlick, 293.
Eysaman v. Small, 390.
- F**
- Fagan v. New York Evening Journal Pub. Co.**, 304.
Fahr v. Hayes, 335, 337, 339, 340.
Fairbury Brick Co. v. Chicago, R. L. & P. R. Co., 513.
Fairchild v. McMahon, 399.
Fairhurst v. Liverpool Ass'n, 167.
Fallon v. Central Park N. & E. R. Co., 547.
Falls v. San Francisco & N. P. R. Co., 531.
Fanning v. Chace, 307.
Fanson v. Linsley, 27, 28.
Fant v. Sullivan, 421.
Farber v. Roginsky, 522.
Faren v. Sellers, 222.
Faris v. Hoberg, 501.
Faris v. Starke, 335.
Farley v. Lincoln, 376.
Farley v. McBride, 325.
Farley v. Thalheimer, 340.
Farmer v. Lyons, 353.
Farmer v. Wilmington & W. R. Co., 545.
Farmers' Co-op. Trust Co. v. Floyd, 414.
Farnsworth v. Storrs, 331, 334.
Farrand v. Marshall, 43.
Farrant v. Barnes, 92.
Farrant v. Thompson, 383.
Farrel v. Colwell, 154.

[The figures refer to pages]

- | | |
|---|--|
| <p>Farrelly v. Hubbard, 372.
 Farrow v. Hoffecker, 535.
 Farwell v. Becker, 238.
 Farwell v. Boston & W. R. Corp., 189.
 Farwell v. Colonial Trust Co., 416.
 Farwell v. Hanchett, 375, 376.
 Fassett, In re, 43.
 Faulkner v. Hall, 522.
 Faust v. Hosford, 410.
 Fawcett v. Dole, 150.
 Fawsett v. Clark, 301.
 Fay v. Lambourne, 112.
 Fay v. Minneapolis & St. L. R. Co., 184.
 Fay v. O'Neill, 490.
 Fearons v. Kansas City Elevated R. Co., 505.
 Fears v. Riley, 158.
 Fears v. Sykes, 246.
 Feary v. Metropolitan St. R. Co., 56.
 Feely v. Jones, 321.
 Felcher v. McMillan, 380.
 Felcin v. Society of New York Hospital, 194.
 Fellman v. Dreyfous, 304.
 Felt v. Germania Life Ins. Co., 422.
 Felton v. Aubrey, 505.
 Feltus v. Swan, 173.
 Feneff v. New York Cent. & H. R. R. Co., 466.
 Fenneman v. Holden, 548.
 Fenstermaker v. Tribune Pub. Co., 296, 342, 343.
 Fent v. Toledo, P. & W. R. Co., 96.
 Fenton v. Bisel, 364.
 Ferdon v. Dickens, 297.
 Ferguson v. Bobo, 160.
 Ferguson v. Firmenich Mfg. Co., 574.
 Ferguson v. Hubbell, 217.
 Ferguson v. Neilson, 247.
 Fero v. Ruscoe, 320.
 Ferren v. Old Colony R. Co., 187.
 Fertich v. Michener, 285.</p> | <p>Fetzer v. Burlew, 489.
 Field v. Colson, 317.
 Field v. Des Moines, 106.
 Fields v. Bynum, 337.
 Fields v. Stokley, 110, 573.
 Fields v. Williams, 367, 368.
 Filber v. Dauterman, 307.
 Filbert v. Delaware & H. Canal Co., 193.
 Filburn v. People's Palace & Aquarium Co., 58, 521.
 Finch v. Board of Education of City of Toledo, 203.
 Findlay v. McAllister, 475.
 Finegan v. Eckerson, 43.
 Finger v. Pollack, 82.
 Finkelstein v. Huner, 569, 574.
 Finlay v. Chirney, 117, 118.
 Finley v. Hershey, 573.
 Finley v. Widner, 322.
 Finn v. Frink, 481.
 Fire Ins. Patrol v. Boyd, 204, 205.
 Firer v. Lowery, 485.
 Firestone v. Rice, 281.
 First Ave. Coal & Lumber Co. v. Johnson, 563.
 First Nat. Bank v. Graham, 208.
 First Nat. Bank v. Indianapolis Piano Mfg. Co., 237.
 Fischer v. Blank, 441.
 Fischer v. Langbeim, 279.
 Fish v. Dodge, 228, 568.
 Fish v. St. Louis County Printing & Publishing Co., 333.
 Fishburn v. Burlington & N. R. Co., 89.
 Fisher v. Badger, 363.
 Fisher v. Boston, 201.
 Fisher v. Budlong, 401.
 Fisher v. Carpenter, 359.
 Fisher v. Cobb, 356.
 Fisher v. Dowling, 73.
 Fisher v. Ellston, 552.
 Fisher v. Golladay, 518.
 Fisher v. Kyle, 378.
 Fisher v. Mellen, 415.
 Fisher v. Prince, 385.</p> |
|---|--|

[The figures refer to pages]

- Fitch v. Gosser, 355.
 Fitts v. Hall, 160.
 Fitzgerald v. Cavin, 115.
 Fitzgerald v. Connors, 469.
 Fitzgerald v. Redfield, 309.
 Fitzgerald v. Robinson, 312.
 Fitzgerald v. Young, 309.
 Fitzpatrick v. Chicago & W. I. R. Co., 223.
 Fitzpatrick v. New Albany & S. R. Co., 178.
 Fitzpatrick v. Welch, 515.
 Fitzwater v. Fassett, 230.
 Fitzwater v. Warren, 194.
 Flagler v. Hearst, 388.
 Flaherty v. Meade Transfer Co., 553.
 Flaherty v. Minneapolis & St. L. R. Co., 231.
 Flaherty v. Moran, 68.
 Flaherty v. Till, 395.
 Flanagan v. Atlantic Alcatraz Asphalt, 511.
 Flandermeyer v. Cooper, 464, 465, 466.
 Flannery v. Brewer, 380.
 Flatow v. Von Premsen, 316.
 Fleischmann v. Bennett, 303, 304.
 Fleischner v. Citizens' Real Estate & Investment Co., 568.
 Fleming v. Brooklyn Heights R. Co., 125, 126.
 Fleming v. Louisville & N. R. Co., 505.
 Fleming v. Shenandoah, 462.
 Flemington v. Smithers, 472.
 Flesh v. Lindsay, 166, 168.
 Fletcher v. Ellis, 497.
 Fletcher v. Fletcher, 107, 286.
 Fletcher v. Rylands, 512.
 Fletcher Co. v. International Ass'n, 434.
 Flight v. Thomas, 578.
 Flike v. Boston & A. R. Co., 184.
 Flint v. Bruce, 262.
 Flint & Walling Mfg. Co. v. Beckett, 501.
 Flood v. News & Courier Co., 316.
 Florida Cent. & P. R. Co. v. Williams, 505, 549.
 Flournoy v. Jeffersonville, 141.
 Flower v. Pennsylvania R. Co., 213.
 Floyd v. State, 261.
 Fluker v. Georgia R. & B. Co., 473.
 Fluker v. Ziegele Brewing Co., 534.
 Flying Fish, The, 138.
 Flynn v. Boglarsky, 337.
 Flynn v. Central R. Co., 512.
 Fodor v. Fuchs, 320.
 Fogarty v. Bogart, 511.
 Fogg v. Boston & Lowell R. Corp., 207.
 Fogg v. Lawry, 475.
 Foley v. Holtry, 409.
 Folmar & Sons v. Copeland & Brantley, 383.
 Folsom v. Lewis, 433.
 Folsom v. Moore, 361.
 Foot v. Card, 464, 465.
 Foot v. Pitt, 317.
 Foote v. American Product Co., 534.
 Forbell v. New York, 350, 351.
 Forbes v. Hagman, 234.
 Forbes v. Marsh, 383.
 Forbes v. Parker, 369, 383.
 Ford v. Fitchburg R. Co., 192.
 Ford v. Glennon, 364.
 Fore v. Western N. C. R. Co., 365.
 Foren v. Rodick, 362, 511.
 Forney v. Geldmacher, 93.
 Forrest v. Hanson, 316.
 Forsyth v. Hooper, 215.
 Fortescue v. Kings County Lighting Co., 365.
 Ft. Smith Suburban R. Co. v. Maledon, 541.
 Fortune v. Jones, 262.
 Ft. Worth & R. G. R. Co. v. Glenn, 562, 563.

[The figures refer to pages]

- | | |
|--|---|
| <p>Forward v. Adams, 310.
 Fosburg v. Phillips Fuel Co., 175.
 Foster v. Charles, 63, 405, 411.
 Foster v. Com., 8.
 Foster v. Denison, 490.
 Foster v. Kennedy's Adm'r, 399, 412.
 Foster v. Pettibone, 154.
 Foster v. Trull, 121.
 Foster-Milburn Co. v. Chinn, 289.
 Fotheringham v. Adams Exp. Co., 273.
 Fottler v. Moseley, 394, 406.
 Fouldes v. Willoughby, 371, 372.
 Fourth Nat. Bank v. Francklyn, 39.
 Fow v. Roberts, 568.
 Fowler v. Dowdney, 307.
 Fowler v. Owen, 354.
 Fowles v. Bowen, 309, 334.
 Fowles v. Hayden, 486.
 Fox v. Barekman, 535.
 Fox v. Buffalo Park, 221.
 Fox v. Ireland, 225.
 Fox v. Warner-Quinlan Asphalt Co., 509.
 Fox Co. v. Hathaway, 441.
 Foxcroft v. Lacy, 296.
 Foy v. Barry, 494.
 Frace v. New York, 96.
 Francis v. Schoellkopf, 72, 75, 562, 574.
 Francis v. Western Union Tel. Co., 86.
 Francisco v. Hatch, 31.
 Frank v. Dessena, 335.
 Franklin v. Butcher, 468, 470.
 Fratini v. Caslini, 463.
 Fray v. Blackburn, 144.
 Frazier v. Turner, 278.
 Fred v. Traylor, 309, 311.
 Fredenburg v. Baer, 511.
 Fredericks v. Northern Cent. R. Co., 531.
 Frederickson v. Johnson, 292.
 Freeman v. Boland, 161, 378.
 Freeman v. F. P. Harbaugh Co., 417.</p> | <p>Freeman v. McDaniel, 74.
 Freeman v. Rankins, 355.
 Freeman v. Sayre, 366.
 Freeman v. Smith, 153.
 Freeman v. Venner, 74, 417.
 French v. Grand Trunk R. Co., 547.
 French v. Vining, 404, 414.
 French v. Vix, 217.
 French v. Willer, 39.
 Fresh v. Cutter, 334.
 Friend v. Hamill, 151.
 Frisbee v. Marshall, 354, 369.
 Frisbie v. Morris, 489.
 Frome v. Dennis, 62, 377.
 Fronk v. Fronk, 466.
 Frost v. Eastern R. R., 507.
 Frost v. Holland, 484.
 Frost v. Mott, 153.
 Frost v. Willard, 387.
 Fry v. Bennett, 340.
 Fry v. Leslie, 158.
 Fry v. McCord Bros., 297.
 Fryer v. Kinnersley, 337.
 Fullam v. Stearns, 73, 357.
 Fuller v. Illinois Cent. R. Co., 544.
 Fullerton v. Thompson, 340.
 Fulton County St. R. Co. v. McConnell, 218.
 Fulton Fire Ins. Co. v. Baldwin, 137.
 Fults v. Munro, 368.
 Funk v. Haldeman, 361.
 Furman v. Van Sise, 470.
 Furr v. Moss, 272.
 Fusili v. Missouri Pac. R. Co., 548.
 F. W. Dodge Co. v. Construction Information Co., 453.
 Fye v. Chapin, 522.</p> |
|--|---|
- G**
- | | |
|--|--|
| <p>Gabbert v. Evans, 527.
 Gabel v. Weisensee, 488.
 Gable v. Sisters of St. Francis, 205.</p> | |
|--|--|

[The figures refer to pages]

- Gage v. Springer, 140.
 Gaines v. Hammond's Adm'r, 129.
 Gaither v. Advertiser Co., 303.
 Galbraith v. Illinois Steel Co., 20.
 Galbraith v. West End St. R. Co., 524.
 Gale v. McDaniel, 130.
 Galena & C. U. R. Co. v. Jacobs, 542.
 Galigher v. Jones, 387.
 Gallagher v. Dodge, 69.
 Gallagher v. Edison Illuminating Co., 537.
 Gallagher v. Flury, 565.
 Galley v. Brennan, 483.
 Gallwey v. Marshall, 311.
 Galveston City R. Co. v. Hewitt, 525.
 Galveston, H. & S. A. R. Co. v. Cade, 127.
 Galveston, H. & S. A. R. Co. v. De Groff, 575.
 Galveston, H. & S. A. R. Co. v. Hennegan, 13.
 Galvin v. Bacon, 375.
 Gambert v. Hart, 527.
 Gambrill v. Schooley, 297, 338.
 Garby v. Bennett, 328.
 Garcelon v. Commercial Travelers' Eastern Acc. Ass'n, 31.
 Garden City G. & N. R. Co. v. Nation, 150.
 Gardner v. Bibbens, 285.
 Gardner v. Day, 33.
 Gardner v. Field, 367.
 Gardner v. Self, 321.
 Gardner v. Thomas, 247.
 Garfield & Proctor Coal Co. v. Rockland-Rockport Lime Co., 511.
 Garing v. Fraser, 490, 581.
 Garlinghouse v. Jacobs, 152.
 Garner v. Trumbull, 505.
 Garrett v. Dickerson, 340.
 Garrett v. Sewell, 353.
 Garretzen v. Duenckel, 213.
 Garrison v. Pearce, 493.
 Garrison v. Sun P. & P. Ass'n, 82.
 Garst v. Charles, 453.
 Garvey v. Long Island R. Co., 576, 577.
 Gary v. Arnold, 522.
 Gassett v. Gilbert, 339, 340.
 Gates v. Blincoe, 571, 572, 573.
 Gates v. Lounsbury, 266.
 Gates v. Meredith, 165.
 Gatta v. Philadelphia, B. & W. R. Co., 525.
 Gattis v. Kilgo, 331, 339, 340.
 Gault v. Wallace, 144.
 Gause v. Perkins, 359.
 Gautret v. Egerton, 510.
 Gaylor v. Hunt, 142.
 G. B. & L. R. Co. v. Eagles, 67.
 Gearon v. Bank of Savings, 281.
 Geary v. Bennett, 306.
 Gee v. Pritchard, 288.
 Geer v. Frank, 498.
 General Steam Nav. Co. v. British & Colonial Steam Nav. Co., 210.
 Genesee Co. Sav. Bank v. Michigan Barge Co., 62.
 Genner v. Sparks, 276.
 Genessee Chief, The, v. Fitzhugh, 43.
 Gensburg v. Marshall Field & Co., 386.
 Gent v. Lynch, 354, 423.
 Geoghegan v. Atlas S. S. Co., 193.
 George v. English, 134.
 George v. Gobey, 33, 213.
 George v. Goddard, 333.
 George v. Skivington, 22, 93.
 George G. Fox Co. v. Hathaway, 441.
 George Jonas Glass Co. v. Glass Bottleblowers' Ass'n, 433, 434, 435.
 Georgia v. Bond, 341.
 Georgia v. Kepford, 317.
 Georgia S. & F. R. Co. v. Jossey, 238.

[The figures refer to pages]

- German Nat. Bank v. Meadowcroft, 208.
 Gerner v. Mosher, 405.
 Gerner v. Gerner, 465, 466.
 Geromini v. Brunelle, 466.
 Gerry v. Gerry, 184.
 Gibbons v. Farwell, 374.
 Gibbons v. Williams, 554.
 Gibbs v. Ames, 478.
 Gibbs v. Price, 310.
 Giblyan v. National Amalgamated Laborers' Union, 431.
 Gibney v. State, 90.
 Gibson v. Bessemer & L. E. R. Co., 551.
 Gibson v. Erie R. Co., 187.
 Gibson v. Fidelity & Casualty Co., 428.
 Gibson v. Gibson, 133.
 Gibson v. Leonard, 37.
 Gibson v. Western New York & P. R. R. Co., 123, 125.
 Gidney v. Blake, 296.
 Giebell v. Collins Co., 186.
 Gifford v. Wiggins, 281.
 Gilbert v. Finch, 125.
 Gilbert v. Nagle, 362.
 Gilbert v. People, 327.
 Gilbert v. Showerman, 565.
 Gilbough v. West Side Amusement Co., 558, 562.
 Gilchrist v. Bale, 458.
 Gilchrist v. Brande, 226.
 Gildersleeve v. Hammond, 516.
 Giles v. Simonds, 361.
 Gill v. Homrighausen, 555.
 Gill v. Middleton, 502.
 Gillespie v. Brooklyn Heights R. Co., 15, 84.
 Gillespie v. J. C. Piles & Co., 397.
 Gillespie v. People, 429.
 Gillet v. Roberts, 375.
 Gillett v. Thiebold, 149.
 Gillett v. Trustees of Village of Kinderhook, 367.
 Gillian v. South & N. A. R. Co., 218.
 Gilman v. Eastern R. Co., 182, 193.
 Gilman v. Emery, 352.
 Gilman v. Gilman, 135.
 Gilman v. Noyes, 76, 103, 120.
 Gilmore v. Bradford, 414.
 Gilmore v. Driscoll, 516, 517.
 Gilmore v. Fuller, 111.
 Gilmore v. Newton, 377.
 Gilshannon v. Stony Brook R. Corp., 178.
 Gilson v. Collins, 169.
 Gilson v. Fisk, 358, 363.
 Gilson v. Wood, 356.
 Ginsberg v. Pohl, 355.
 Ginsberg v. Union Surety & Guaranty Co., 332.
 Girsby v. Stapleton, 403.
 Ginstl v. Del Papa, 485.
 Givens v. Van Studdiford, 577.
 Glamorgan Coal Co. v. South Wales Miners' Federation, 448, 455.
 Glaser v. Rothschild, 510, 511.
 Glavin v. Rhode Island Hospital, 204.
 Glazar v. Hubbard, 145.
 Glaze v. McMillion, 374, 379.
 Glencoe Land & Gravel Co. v. Hudson Bros. Commission Co., 452, 453.
 Glidden v. Goodfellow, 568.
 Gmaehle v. Rosenberg, 40.
 Gniabck v. Northwestern Improvement & Boom Co., 541.
 Godette v. Gaskill, 476.
 Godfrey v. Olson, 408.
 Godsey v. Bason, 475.
 Goetcheus v. Matthewson, 151.
 Goffin v. Donnelly, 327.
 Goken v. Dallugge, 168.
 Goldberg v. Markowitz, 157.
 Goldberg, Bowen & Co. v. Stablemen's Union, 435, 444.
 Goldberger v. Philadelphia Grocer Pub. Co., 317.
 Goldman v. Cohen, 466.

[The figures refer to pages]

- Goldsborough v. Orem & Johnson**, 295.
Gompers v. Buck's Stove & Range Co., 442.
Goodell v. Tower, 275.
Goodman v. Coal Tp., 236.
Goodrich v. Davis, 300.
Goodspeed v. East Haddam Bank, 207.
Goodwin v. Robarts, 373.
Goodwin v. Werthelmer, 376.
Goodyear Dental Vulcanite Co. v. White, 497.
Gordon v. Bruner, 27.
Gordon v. Butler, 398.
Gordon v. Drake, 44.
Gordon v. Harper, 383.
Gordon v. Hostetter, 373.
Gordon v. Irvine, 414.
Gordon v. State, 5.
Gore v. Condon, 454, 455.
Gorgier v. Mievillie, 373.
Gorham v. Gross, 224.
Gorham v. Ives, 300.
Gorlitzer v. Wolffberg, 119.
Gorman v. State, 270.
Gorris v. Scott, 37.
Gott v. Berea College, 438.
Gott v. Pulsifer, 323.
Gottbehuet v. Hubachek, 309.
Gough v. Goldsmith, 299, 317.
Gould v. Weed, 344.
Gould v. Winona Gas Co., 537.
Goulet v. Asseler, 369.
Gove v. Watson, 378, 388.
Grace v. Floyd, 498.
Grace v. Mitchell, 156.
Grace & Hyde Co. v. Probst, 179.
Grady v. Wolsner, 515, 568.
Graessle v. Carpenter, 366, 367.
Graham v. Boston & A. R. Co., 180.
Graham v. Dahlenega Gold Mining Co., 230.
Graham v. Meyer, 226, 402.
Graham v. Peat, 354.
Graham v. Pocasset Mfg. Co., 509.
Graham v. St. Charles St. R. Co., 437.
Graham v. State, 333.
Graham v. Wallace, 49, 287.
Grainger v. Hill, 494, 495.
Gramm v. Boener, 527.
Grand Trunk R. Co. v. Cummings, 194.
Grand Trunk R. Co. v. Edwards, 372.
Grand Trunk R. Co. v. Ives, 532.
Granger v. George, 130.
Grant v. Louisville & N. R. Co., 569.
Grant v. Moore, 489.
Grant v. Pennsylvania & N. Y. Canal & R. Co., 100.
Grant v. Willey, 82.
Grael v. Wolfe, 406.
Graves v. Baltimore & N. Y. R. Co., 367.
Graves v. Dawson, 489.
Graves v. Scott, 490.
Gray v. Buildings Trades Council, 443.
Gray v. Harris, 513.
Gray v. Pullen, 218.
Gray v. Reeves, 410.
Gray v. Times Newspaper Co., 344.
Green v. Button, 455.
Green v. Chicago & W. M. R. Co., 505.
Green v. Davies, 230.
Green v. Dunn, 380.
Green v. Eastern R. Co. of Minnesota, 35.
Green v. Los Angeles Terminal R. Co., 545.
Green v. Morse, 278.
Green v. Soule, 219.
Green v. Stephens, 388.
Green v. Western Union Tel. Co., 86.

[The figures refer to pages]

- | | |
|--|---|
| <p>Green-Wheeler Shoe Co. v. Chicago, R. I. & P. R. Co., 529.
 Green & O. St. Pass. R. Co. v. Bresmer, 187.
 Greene v. Minneapolis & St. L. R. Co., 188.
 Greenleaf v. Egan, 169.
 Greenleaf v. Francis, 69.
 Greenman v. O'Riley, 287.
 Greenway v. Fisher, 378.
 Greenwood v. Greenwood, 469.
 Greenwood v. Westport, 43.
 Gregg v. Wyman, 112.
 Gregor v. Cady, 502.
 Gregory v. Atkins, 345.
 Gregory v. Duke of Brunswick, 584.
 Gregory v. Oakland Motor Car Co., 462.
 Grenada Lumber Co. v. Mississippi, 438.
 Gressman v. Morning Journal Ass'n, 342.
 Greve v. Wood-Harmon Co., 354.
 Grider v. Tally, 141, 142.
 Gridley v. Bloomington, 568.
 Griebel v. Rochester Printing Co., 61, 294.
 Grier v. Ward, 364.
 Griffen v. Manice, 537.
 Griffin v. Moore, 306.
 Griggs v. Day, 386.
 Grigsby v. Clear Lake Water Works Co., 570.
 Grigsby v. Stapleton, 403.
 Grill v. Gutfreund, 510.
 Grimes v. Coyle, 332.
 Grinnell v. Wells, 468.
 Grinnell v. Weston, 231.
 Griswold v. Judd, 372.
 Groeltz v. Armstrong, 414.
 Groff v. Ankenbrandt, 570.
 Gross Coal Co. v. Rose, 309.
 Groth v. Thomann, 185.
 Grotten v. Glidden, 116.
 Grove v. Hodges, 31.
 Grove v. Van Duyn, 149.</p> | <p>Groves v. Winborne, 84, 86.
 Grumon v. Raymond, 144, 157.
 Guenther v. St. Louis, I. M. & S. R. Co., 544.
 Guest v. Reynolds, 48, 68.
 Guethler v. Altman, 438.
 Guille v. Campbell, 213.
 Guille v. Swan, 91, 349.
 Guillaume v. Rowe, 125, 278.
 Gulf, C. & S. F. R. Co. v. Gordon, 121, 122.
 Gulf, C. & S. F. R. Co. v. Green, 89.
 Gunder v. Tibbits, 231.
 Gunsolus v. Lormer, 353.
 Gunther v. Dranbauer, 242.
 Gunther v. Lee, 124.
 Gurley v. Armstead, 378.
 Gus Blass Dry Goods Co. v. Reinman & Wolfort, 565.
 Gustafson v. Chicago, R. I. & P. R. Co., 171.
 Guttner v. Pacific Steam Whaling Co., 352, 356, 387.
 Guy v. Churchill, 498.
 Gwaltney v. Scottish Carolina Timber & Land Co., 369.
 Gwynn v. Duffield, 227.
 Gyre v. Culver, 266.</p> <p style="text-align: center;">H</p> <p>Haag v. Cooley, 341.
 Haaga v. Austro-Americana Line, 530.
 Haas v. Damon, 16, 377, 379.
 Hacker v. Heiney, 82.
 Hackett v. McMillan, 496.
 Hackler v. Miller, 130.
 Haddock v. Osmer, 414, 415, 416.
 Haddock v. Naughton, 321.
 Haddrick v. Heslop, 487, 488.
 Hadley v. Bryars' Adm'r, 118.
 Hagar v. Norton, 387.
 Hagar v. Randall, 379.
 Hager v. Danforth, 139.
 Haggerty v. Wilber, 153.</p> |
|--|---|

[The figures refer to pages]

- Hahnemannian Life Ins. Co. v. Beebe, 135.
 Haight v. Hayt, 401.
 Haire v. Miller, 130.
 Hairston v. State, 263.
 Hake v. Brames, 315.
 Halberstadt v. New York Life Ins. Co., 480, 492.
 Hale v. Clark, 357.
 Hale v. Lawrence, 241.
 Hale v. New Jersey Steam Nav. Co., 528.
 Hale v. Philbrick, 409.
 Hall v. Corcoran, 112, 378.
 Hall v. Eaton, 9.
 Hall v. Hennesley, 297.
 Hall v. Missouri Pac. R. Co., 504.
 Hall v. Snowhill, 356.
 Hall v. Suydam, 483.
 Halley, The, 248.
 Hallock v. Dominy, 279.
 Hallock v. Miller, 318.
 Halsey v. Woodruff, 237.
 Halstead v. Houston, 441.
 Ham v. New York, 201.
 Haman v. Omaha Horse R. Co., 260.
 Hamet v. Letcher, 376.
 Hamilton v. Arnold, 266.
 Hamilton v. Eno, 325.
 Hamilton v. Great Falls St. R. Co., 461.
 Hamilton v. Lomax, 116, 158, 287.
 Hamilton v. Plainwell Water Power Co., 46.
 Hamilton v. Smith, 46, 82.
 Hamilton v. Third Ave. R. Co., 82.
 Hamilton v. Whitridge, 558.
 Hamilton-Brown Shoe Co. v. Saxey, 449.
 Hamilton, Harris & Co. v. Larimer, 535.
 Hamlin v. Mack, 363, 475.
 Hamlin v. Sears, 235.
 Hammer v. Wilsey, 365.
 Hammers v. Colorado Southern N. O. & P. R. Co., 545.
 Hammill v. Pennsylvania R. Co., 63, 94, 98.
 Hammond v. Doty, 270.
 Hammond v. Sullivan, 367, 372.
 Hammond Co. v. Johnson, 180.
 Hanchett v. Chiatovich, 300.
 Hancock v. Blackwell, 336.
 Hand v. Winton, 314.
 Handy v. Foley, 165.
 Handy v. Waldron, 407.
 Haney Mfg. Co. v. Perkins, 226.
 Hanger v. Evins, 395.
 Haniford v. Kansas, 200.
 Hankinson v. Bilby, 301.
 Hann v. Lloyd, 278.
 Hanna v. Granger, 193.
 Hannabalson v. Sessions, 262, 348.
 Hannibal & St. J. R. Co. v. Husen, 110.
 Hannon v. Slegel-Cooper Co., 208.
 Hanrahan v. Cochran, 231.
 Hansbrough v. Stinnett, 302.
 Hanse v. Cowing, 567.
 Hansen v. Nicoll, 581.
 Hanson v. Globe Newspaper Co., 294.
 Hanson v. Hammell, 186.
 Hanson v. Innis, 431.
 Hardeman v. Williams, 213.
 Harding's Case, 268.
 Hardy v. Reed, 383.
 Hardy v. Williamson, 295.
 Hare v. Dean, 468.
 Hare v. McIntire, 36, 171.
 Harford County Com'rs v. Hamilton, 472.
 Harker v. Clark, 118.
 Harkrader v. Moore, 487.
 Harley v. Buffalo Car Mfg. Co., 179.
 Harley v. Merrill Brick Co., 233.
 Harley v. Riverside Mills, 126.
 Harms v. Jacobs, 359.
 Harness v. Steele, 82.
 Harnett v. Maitland, 392.
 Harpending v. Shoemaker, 27.
 Harper v. Harper, 484.

[The figures refer to pages]

- | | |
|---|---|
| <p>Harper v. Luffken, 473.
 Harriman v. Pittsburg, O. & St. L. R. Co., 88.
 Harrington v. Board of Aldermen of City of Providence, 109.
 Harrington v. Hall, 364.
 Harrington v. McCarthy, 71.
 Harrington v. Ward, 140.
 Harrington v. Woodbridge Tp., 200.
 Harriott v. Plimpton, 233.
 Harris v. Briscoe, 498.
 Harris v. Burley, 310.
 Harris v. Cohen, 568.
 Harris v. Marco, 266.
 Harris v. Savage, 526.
 Harris v. State, 271.
 Harris v. Thompson, 334.
 Harris v. Uebelhoer, 549.
 Harris v. Webster, 168.
 Harris v. Zanone, 303, 304, 340.
 Harrisburgh, The, 32, 246.
 Harrison v. Adamson, 348.
 Harrison v. Bush, 328, 335.
 Harrison v. Howe, 423.
 Harrison v. Kiser, 223.
 Harrison v. Wisdom, 107.
 Harriss v. Sneed, 423.
 Harrod v. Latham Mercantile & Commercial Co., 34.
 Harrower v. Ritson, 572.
 Hart v. Aldridge, 445.
 Hart v. Blake, 367.
 Hart v. Chicago & N. W. R. Co., 530.
 Hart v. Doyle, 353.
 Hart v. Knapp, 466.
 Hart v. Northern Pac. R. Co., 533.
 Hart v. Reed, 336.
 Hart v. Waldo, 408.
 Hartfield v. Roper, 553.
 Hartford v. Brady, 347.
 Hartford Iron Mining Co. v. Cambria Mining Co., 373.
 Hartford Live Stock Ins. Co. v. Matthews, 411.</p> | <p>Hartnett v. Boston Store of Chicago, 535.
 Harton v. Forest City Tel. Co., 553.
 Hartshorn v. Chaddock, 367.
 Hartshorn v. Smith, 485.
 Harvey v. Dewoody, 573.
 Harvey v. Morse, 387.
 Harway v. Boulton, 283.
 Harwood v. Keech, 340.
 Harwood v. Siphers, 157.
 Hasbrouck v. Armour & Co., 520.
 Hasbrouck v. New York Cent. & H. R. R. Co., 530.
 Haskins v. Ralston, 477.
 Haskins v. Royster, 445.
 Haslett v. Rodgers, 154.
 Hastings v. Stetson, 87.
 Hasty v. Sears, 189.
 Hatch v. Barrett, 395.
 Hatch v. Donnell, 346.
 Hatch v. Lane, 332, 337.
 Hatchard v. Mege, 419.
 Hatfield v. Lasher, 342, 343.
 Hatton v. Holmes, 151.
 Hauk v. Brownell, 399.
 Hausler v. Commonwealth Electric Co., 526.
 Havely v. Lowry, 352.
 Haver v. Central R. Co. of New Jersey, 214.
 Haverly v. State L. & S. R. Co., 79, 87, 96.
 Hawarden v. Youghiogheny & L. Coal Co., 438.
 Hawes v. Dunlop, 496.
 Hawke v. Brown, 225.
 Hawkins v. Hoffman, 374.
 Hawkins v. Kuhne, 284.
 Hawkins v. Roby, 353.
 Hay v. Cohoes Co., 58, 346, 515.
 Hay v. Reid, 343.
 Haycraft v. Creasy, 415, 416.
 Hayden v. Dutcher, 48.
 Hayes v. Ball, 301.</p> |
|---|---|

[The figures refer to pages]

- Hayes v. East Tennessee, V. & G. R. Co., 123.
 Hayes v. Miller, 521.
 Hayes v. Mitchell, 283.
 Hayes v. Press Co., 329.
 Hayner v. Cowden, 308, 311.
 Hayner v. People, 263.
 Haynes v. Nowlin, 464, 465.
 Hays v. Miller, 526.
 Hazelton v. Locke, 373.
 Hazzard v. Flury, 486.
 Hazzard v. State, 192.
 Head v. Briscoe, 165, 167.
 Healey v. Ballantine & Sons, 462, 522.
 Heaney v. Long Island R. Co., 533.
 Hearn v. Shaw, 495.
 Hearn v. Waterbury Hospital, 204.
 Heath v. American Book Co., 453.
 Heath v. Halfhill, 155, 156.
 Heath v. West, 355.
 Heather v. Pardon, 578.
 Heaton-Peninsular Button Fastener Co. v. Dick, 451.
 Heaven v. Pender, 21, 520.
 Hebner v. Great Northern R. Co., 339.
 Heckle v. Lurvey, 375.
 Hector Mining Co. v. Robertson, 504.
 Hedin v. Minneapolis Medical & Surgical Institute, 401.
 Heeg v. Licht, 57, 75, 559, 565.
 Heermance v. James, 463.
 Hefferen v. Northern Pac. R. Co., 194.
 Hegarty v. Shine, 115.
 Heilbronn v. Herzog, 23.
 Heinz v. Lutz, 441.
 Heisler v. Heisler, 463, 466.
 Helberg v. Hosmer, 411.
 Heldmaier v. Cobbs, 177.
 Heller v. Duff, 309.
 Heller v. Pulitzer Pub. Co., 345.
 Hellstern v. Katzer, 309.
 Hellwig v. Mitchell, 305.
 Helmke v. Thilmany, 178.
 Helms v. Northern Pac. R. Co., 233.
 Helwig v. Jordan, 228.
 Heminway v. Heminway, 265.
 Hemmens v. Nelson, 302.
 Henderson v. Vaulx, 360.
 Hendricks v. Evans, 386.
 Hendrickson v. Great Northern R. Co., 533.
 Hendrix v. State, 266.
 Henke v. McCord, 139.
 Henley v. Wilson, 165, 168.
 Henry v. Cherry, 289.
 Henry v. Dennis, 98, 404.
 Henry v. Ohio River R. Co., 131.
 Henry v. St. Louis, K. C. & N. R. Co., 103.
 Henry v. Sargeant, 241, 244.
 Henry W. Boettger Silk Finishing Co. v. Electrical Audit & Rebate Co., 31.
 Henshaw v. Noble, 171.
 Hensler v. Stix, 120.
 Herbert v. Rainey, 574.
 Herd v. Weardale, 276.
 Herkimer Lumber Co. v. State, 197.
 Herlihy v. Smith, 227.
 Herman v. Owen, 368.
 Herman v. P. H. Fitzgibbons Boiler Co., 126.
 Herrick v. Tribune Co., 315, 316.
 Herrick v. Wixom, 504.
 Herring v. Boyle, 277.
 Herring v. Jester, 469, 472.
 Herring v. Skaggs, 235.
 Herring v. Wilton, 574.
 Herringer v. Ingberg, 323.
 Hersey v. Chapin, 353, 355.
 Hertz v. Chicago, I. & S. R. Co., 526.
 Herzog v. Fitzgerald, 435.
 Hess v. Oregon Baking Co., 483.
 Hesse v. National Casket Co., 185.

[The figures refer to pages]

- Hetfield v. Central R. Co., 360.
Hetherington v. Sterry, 314.
Hetrick v. Crouch, 259.
Hewett v. Swift, 233.
Hewitt v. Flint & P. M. R. Co., 122.
Hewitt v. Newburger, 278, 280.
Hewitt v. Pioneer Press Co., 343.
Hewitt v. Prime, 469.
Hewlett v. George, 133.
Hexamer v. Webb, 215, 218.
Heyne v. Blair, 482, 483.
Heyward v. Cuthbert, 480.
Heywood v. Tillson, 437.
H. Hirschberg Optical Co. v. Michaelson, 407.
Hibbins v. Lee, 330.
Hickey v. Merchants' & Miners' Transp. Co., 207.
Hickey v. Michigan Cent. R. Co., 571, 572.
Hickey v. Morrell, 398.
Hickey v. Welch, 82, 85, 86.
Hicks v. Deemer, 418.
Hicks v. Dorn, 153.
Hicks v. Faulkner, 487.
Hidy v. Murray, 484.
Higby v. Pennsylvania R. Co., 284.
Higgins v. Dewey, 80.
Higgins v. Los Angeles Gas & Electric Co., 551.
Higgins v. Minaghan, 260.
Higgins v. Public Service R. Co., 534.
Higgins v. Western Union Tel. Co., 179.
Higham v. Vanosdol, 459.
Highway Com'rs v. Ely, 139.
Highway Com'rs of Niles Tp. v. Martin, 203.
Hildebrand v. McCrum, 274.
Hildreth v. Camp, 166.
Hill v. Board of Aldermen of City of Charlotte, 202.
Hill v. Boston, 201.
Hill v. Canfield, 386.
Hill v. Gray, 403.
Hill v. Hayes, 377.
Hill v. Haynes, 156.
Hill v. U. S., 197.
Hill v. Ward, 419, 423.
Hill v. Winsor, 79.
Hilliard v. Richardson, 219.
Hillman v. Star Pub. Co., 290.
Hills v. Hobert, 467.
Hilmes v. Strobel, 231.
Hilton v. Fitchburg R. Co., 183.
Hilts v. Chicago & G. T. R. Co., 182, 183.
Hinchman v. Weeks, 404.
Hinckley v. Cape Cod R. Co., 556.
Hindman v. First Nat. Bank, 405, 411.
Hinds v. Harbou, 171.
Hinds v. Jones, 167.
Hinds v. Parker, 491.
Hines v. Charlotte, 200.
Hines v. Lockport, 200.
Hines v. Shumaker, 336.
Hingston v. L. P. & J. A. Smith Co., 409.
Hippler v. Quandt, 487.
Hirschberg Optical Co. v. Michaelson, 407.
Hitch v. Lambright, 144.
Hoadley v. Northern Transp. Co., 81, 244.
Hoag v. Lake Shore & M. S. R. Co., 77, 80.
Hoar v. Ward, 316.
Hoar v. Wood, 327, 328.
Hoard v. Beck, 461.
Hoare v. Silverlock, 330.
Hobart v. Hagget, 10, 62.
Hobbit v. London & N. W. R. Co., 223.
Hobbs v. Ray, 278, 477.
Hoberg v. Collins, Lavery & Co., 503.
Hoboken Printing & Publishing Co. v. Kahn, 343.
Hodder v. Williams, 153.
Hodecker v. Stricker, 466.

[The figures refer to pages]

- Hodge v. Wetzler, 464.
 Hodgeden v. Hubbard, 266, 267.
 Hodges v. Marks, 475.
 Hodges v. State, 297.
 Hodges v. Tama County, 39.
 Hodsoll v. Stallebrass, 473.
 Hoefler v. Hoefler, 475.
 Hoey v. New York Times Co., 294.
 Hoff v. Shockley, 219.
 Hofflund v. Journal Co., 303.
 Hoffman v. Carow, 61, 377.
 Hoffman v. Gill, 418.
 Hoffman v. King, 80, 95, 96, 97.
 Hoffman v. Noble, 376.
 Hoffman v. Toft, 417.
 Hofreiter v. Schwabland, 386.
 Hogan v. Manhattan R. Co., 537.
 Hogle v. New York Cent. & H. R. Co., 543.
 Holbrook v. Connor, 399.
 Holbrook v. Henderson, 198.
 Holcomb v. Noble, 413.
 Holden v. Merritt, 488.
 Holder v. Cannon Mfg. Co., 449.
 Hole v. Sittingbourne & S. R. Co., 217.
 Holeproof Hosiery Co. v. Wallach Bros., 440.
 Holland v. Stoner, 300.
 Holland House Co. v. Baird, 350.
 Hollander v. Hudson, 512.
 Holleman v. Harward, 461.
 Hollenbeck v. Hall, 292.
 Hollenbeck v. Ristine, 317.
 Holley v. Mix, 284.
 Holliday v. Holliday, 483, 485, 490.
 Holliday v. Jackson, 235.
 Hollinberger v. Stewart, 584.
 Hollingsworth v. Howard, 236.
 Hollis v. Kansas City, Mo., Retail Merchants' Ass'n, 510.
 Hollister v. Goodale, 352.
 Hollon v. Lilly, 144.
 Holmes v. Clisby, 332.
 Holmes v. Drew, 510.
 Holmes v. Johnson, 480.
 Holmes v. Loud, 138.
 Holmes v. North Eastern R. Co., 510.
 Holmes v. Rivers, 399, 417.
 Holmes v. Royal Fraternal Union, 332.
 Holmes v. Seely, 354.
 Holsman v. Bolling Spring Bleaching Co., 578.
 Holstein v. Phillips, 528.
 Holton v. Noble, 398.
 Holtz v. Dick, 168, 459.
 Holz v. Rediske, 156.
 Homans v. Boston El. R. Co., 83.
 Homer v. Engelhardt, 317.
 Homer v. Thwing, 161.
 Homer Ramsdell Transp. Co. v. La Compagnie Générale Transatlantique, 210.
 Homuth v. Metropolitan St. R. Co., 126.
 Honsee v. Hammond, 367.
 Honywood v. Honywood, 390.
 Hood v. Palm, 584.
 Hood v. Sudderth, 287.
 Hook v. Hackney, 309.
 Hooker v. Miller, 264, 504.
 Hooper v. Whitaker, 406.
 Hopkins v. Drowne, 423.
 Hopkins v. Oxley Stave Co., 442.
 Hopper v. Reeve, 258.
 Horan v. Byrnes, 49, 68.
 Horandt v. Central R. Co. of New Jersey, 552.
 Hordern v. Salvation Army, 206.
 Horgan v. Pacific Mills, 470.
 Horner v. Battyn, 274.
 Horner v. Lawrence, 170.
 Horney v. Nixon, 360.
 Hosmee v. Republic Iron & Steel Co., 562.
 Hostetter v. Green, 459.
 Hotchkiss v. Bon Air C. & I. Co., 398.
 Hotchkiss v. Oliphant, 344.
 Hough v. Southern R. Co., 233.
 Houghton v. Butler, 119.

[The figures refer to pages]

- | | |
|---|---|
| <p>Houghton v. Rice, 463, 465.
 Hounsell v. Smyth, 511.
 Hourigan v. Norwich, 201.
 House v. Metcalf, 228.
 Householder v. Kansas City, 89.
 Houseman v. Girard Mut. Bldg.
 & Loan Ass'n, 140, 152.
 Houston v. Brush & Curtis, 180,
 537.
 Houston v. Thornton, 413.
 Hover v. Barkhoof, 152.
 Hovey v. Rubber Tip Pencil Co.,
 332, 423.
 Howard v. Brooklyn, 200.
 Howard v. Dickle, 334.
 Howard v. Gould, 411.
 Howard County v. Chicago & A.
 R. Co., 130.
 Howarth v. Barlow, 324, 333.
 Howe v. Clancey, 27.
 Howe v. Oyer, 153.
 Howe Mach. Co. v. Souder, 213.
 Howell v. Hair, 246.
 Howell v. Howell, 165, 467.
 Howell v. Jackson, 272.
 Hower v. Weiss Malting & Eleva-
 tor Co., 360.
 Howland v. George F. Blake Mfg.
 Co., 114, 115, 299.
 Howser v. Cumberland & P. R.
 Co., 537.
 Hoxsie v. Nodine, 237.
 Hoyt v. Danbury, 200.
 Hoyt v. Gelston, 356.
 Hoyt v. Van Alstyne, 356.
 H. S. Pickands, The, 44.
 Hubbard v. Allyn, 324.
 Hubbard v. Hunt, 234.
 Hubbard v. McLean, 401.
 Hubbard v. Mobile & O. R. Co.,
 530.
 Hubbard v. Rutledge, 336, 341.
 Huber v. Merkel, 69.
 Huber v. Stark, 515.
 Huchting v. Engel, 157.
 Huckenstine's Appeal, 565.</p> | <p>Huddleston v. Johnson, 73.
 Hudkins v. Haskins, 469, 470.
 Hudson v. Wabash Western R.
 Co., 555.
 Hudson & Delaware Canal Co. v.
 New York & E. R. Co., 575.
 Huff v. Wells Fargo & Co., 511.
 Huftalin v. Misner, 365.
 Hughes v. Atlantic City & S. R.
 Co., 536, 537.
 Hughes v. Auburn, 562.
 Hughes v. Baltimore & O. R. Co.,
 182, 183.
 Hughes v. Cincinnati & S. R. Co.,
 223.
 Hughes v. Monroe County, 201.
 Hughes v. Stevens, 354.
 Hulett v. Swift, 528.
 Hull v. Sanctuary, 354.
 Humboldt Bldg. Ass'n v. Ducker's
 Ex'r, 527.
 Hume v. Tufts, 355.
 Humphrey v. Douglass, 158, 363.
 Humphrey v. Merriam, 415.
 Humphreys v. Stanfield, 316.
 Humpton v. Unterkircher, 215,
 223.
 Hundley v. Harrison, 564.
 Huning v. Chavez, 369.
 Hunnewell v. Duxbury, 62, 405.
 Hunnicut v. Higginbotham, 373.
 Hunt v. Barker, 409.
 Hunt v. Bennett, 345.
 Hunt v. Conrad, 137.
 Hunt v. Fidelity Mut. Life Ins.
 Co., 320.
 Hunt v. Lathrop, 154.
 Hunt v. New York Cotton Exch.
 454.
 Hunt v. Simonds, 583.
 Hunter v. Burlington, C. R. & N.
 R. Co., 129.
 Hunter v. Sharpe, 323.
 Huntington v. Attrill, 5.
 Huntley v. Mathias, 213.
 Huntley v. Ward, 333.</p> |
|---|---|

[The figures refer to pages]

- Huntress v. Blodgett, 415.
 Hupfer v. National Distilling Co., 510.
 Hurd v. Fleming, 356.
 Huribut v. McKone, 567, 579.
 Hurley v. Eddingfield, 9.
 Hurwitz v. Hurwitz, 9, 475.
 Huset v. J. I. Case Threshing Mach. Co., 93, 518.
 Huskie v. Griffin, 427, 428, 430.
 Hussey v. Davis, 157.
 Huston v. Freemansburg Borough, 83, 255.
 Hutcheson v. Peck, 458, 459.
 Hutchins v. Hutchins, 9.
 Hutchinson v. York, N. & B. R. Co., 186, 189.
 Hutton v. Watters, 583.
 Huxley v. Hartzell, 379.
 Hyde v. Cooper, 234.
 Hyde v. Noble, 375.
 Hyde v. Shine, 582.
 Hyland v. New York Cent. & H. R. R. Co., 128.
 Hynds v. Wynn, 529.
 Hynes v. Brewer, 578.
 Hynes v. Patterson, 378.
- I
- Iba v. Hannibal & St. J. R. Co., 40.
 Idaho, The, 384.
 Ide v. Graham, 410.
 Ihl v. Forty-Second St. & G. St. Ferry R. Co., 92, 547.
 Ilion Bank v. Carver, 135.
 Illidge v. Goodwin, 88.
 Illinois Cent. R. Co. v. Allen, 115.
 Illinois Cent. R. Co. v. Anderson 90.
 Illinois Cent. R. Co. v. Caffrey, 454.
 Illinois Cent. R. Co. v. Frankenberg, 528.
 Illinois Cent. R. Co. v. Jernigan, 547.
- Illinois Cent. R. Co. v. Mizell, 533.
 Illinois Cent. R. Co. v. Welch, 125.
 Illinois Cent. R. Co. v. Wilkins, 550.
 Illinois Commission Co. v. Cleveland Tel. Co., 454.
 Ilsley v. Nichols, 153.
 Ilsley v. Sentinel Co., 329, 330.
 Inderlied v. Honeywell, 411.
 Indermaur v. Dames, 510.
 Indiana, B. & W. R. Co. v. Greene, 553.
 Indiana, B. & W. R. Co. v. Overton, 499.
 Indianapolis, B. & W. R. Co. v. McLaughlin, 369.
 Indianapolis Traction & Terminal Co. v. Croly, 545, 546, 547.
 Indian Refining Co. v. Mobley, 509.
 Industrial & General Trust v. Tod, 30, 378.
 Ingalls v. Bulkley, 380, 381.
 Ingalls v. Miller, 407.
 Ingersoll v. Barnes, 380.
 Ingersoll v. Rousseau, 558, 574.
 Ingram v. Root, 491.
 Ingwersen v. Rankin, 568.
 Inhabitants of Houlton v. Titcomb, 577.
 Inhabitants of Lowell v. Boston & L. R. Corp., 239.
 Inhabitants of Marion v. Tuell, 571, 572.
 Inhabitants of Rockport v. Rockport Granite Co., 229.
 Inland & Seaboard Coasting Co. v. Tolson, 544.
 Inman v. Foster, 342.
 Innes v. Milwaukee, 179.
 International Nav. Co. v. Lindstrom, 246.
 International Text Book Co. v. Leader Printing Co., 295.

[The figures refer to pages]

- International & G. M. R. Co. v. Greenwood, 437.
 Interstate R. Co. v. Tyree, 555.
 Iowa Cent. R. Co. v. Walker, 544.
 Ireland v. McGarvish, 312.
 Ireland v. Ward, 462.
 Irion v. Lewis, 144.
 Iron Age Pub. Co. v. Crudup, 314, 315.
 Iron City Nat. Bank of Pittsburg v. Du Puy, 402.
 Iron Moulders' Union v. Allis-Chalmers Co., 428, 431, 434, 447, 449.
 Iron Mountain & H. R. Co. v. Johnson, 270.
 Irvine v. Gibson, 163.
 Irwin v. Nolde, 367.
 Irwin v. Patchen, 353.
 Isham v. Broderick, 568.
 Isham v. Post, 527.
 Itzkovitch v. Whitaker, 291.
 Ivy Coal & Coke Co. v. Alabama Coal & Coke Co., 373.
- J**
- Jackson v. Adams, 308.
 Jackson v. Brownson, 390.
 Jackson v. Butler, 548.
 Jackson v. Hopperton, 339.
 Jackson v. Stanfield, 456.
 Jackson v. Stetson, 322.
 Jacobs v. Cohen, 430.
 Jacobs v. H. J. Koehler Sporting Goods Co., 548, 553.
 Jacobs v. Pollard, 238.
 Jacobsen v. Siddal, 459.
 Jacobsen v. Whitely, 409.
 Jacobson v. Johnson, 180.
 Jacobson v. Massachusetts, 109.
 Jaffe v. Harteau, 502.
 Jaggar v. Winslow, 400.
 James v. Caldwell, 352.
 James v. Campbell, 54, 57.
 James v. Crosthwait, 402, 403.
 James v. Evans, 581, 582, 584.
 James v. Hayward, 571.
 James Co. v. Continental Nat. Bank, 23.
 Jamison v. Ellsworth, 417.
 Jamison v. Myrtle Lodge No. 355, A. F. & A. M., 516, 556.
 Janes v. Trustees, 410.
 Jansen v. Jersey City, 189.
 J'Anson v. Stuart, 315.
 Jaques v. Great Falls Mfg. Co., 181.
 Jarvis v. Hatheway, 334.
 Jeems v. Lewis, 380.
 Jeffrey v. Bigelow, 403.
 Jeffries v. Ankeny, 151.
 Jeffries v. Duncombe, 293.
 Jeffries v. Seaboard Air Line R. Co., 504.
 Jefts v. York, 414.
 Jenkins v. Fowler, 65.
 Jenkins v. Minneapolis & St. L. R. Co., 533.
 Jenney Electric Light & Power Co. v. Murphy, 187.
 Jennings v. Rundall, 157.
 Jensen v. Denver & R. G. R. Co., 500.
 Jensen v. Maine Eye & Ear Infirmary, 204, 205.
 Jersey City Printing Co. v. Cassidy, 433, 445.
 Jessen v. Sweigert, 568.
 Jessup v. Carnegie, 39.
 Jewell v. Colby, 162, 164.
 Jewell v. Kansas City Bolt & Nut Co., 173.
 Jewett v. Whitney, 73, 353, 366.
 J. M. James Co. v. Continental Nat. Bank, 23.
 Joannes v. Bennett, 335.
 Joannes (Count) v. Burt, 308, 316.
 Joannes v. Jennings, 319.
 Johns v. Press Pub. Co., 323.
 Johnson v. Allen, 458.
 Johnson v. Ashland Water Co., 184.
 Johnson v. Bay City, 547.
 Johnson v. Boston, 189.

[The figures refer to pages]

- Johnson v. Boston Towboat Co., 181.
 Johnson v. Bouton, 145.
 Johnson v. Carolina, C. & O. R. Co., 223.
 Johnson v. Carter, 361.
 Johnson v. Cate, 415.
 Johnson v. Chicago & N. W. R. Co., 244.
 Johnson v. Chicago & P. Elevator Co., 44.
 Johnson v. Com., 298.
 Johnson v. Ebberts, 488.
 Johnson v. Farr, 375.
 Johnson v. Farwell, 366.
 Johnson v. Girdwood, 115, 485.
 Johnson v. Glidden, 526.
 Johnson v. Hitchcock, 439.
 Johnson v. Lewis, 569.
 Johnson v. Lindsay, 189.
 Johnson v. Louisville & N. R. Co., 549.
 Johnson v. McKeown, 166.
 Johnson v. Maxon, 149.
 Johnson v. Morton, 279.
 Johnson v. Northwestern Tel. Exch. Co., 98.
 Johnson v. Parker, 368.
 Johnson v. Pie, 160.
 Johnson v. Robertson, 308.
 Johnson v. St. Paul City R. Co., 548.
 Johnson v. St. Paul & D. R. Co., 35.
 Johnson v. Shields, 306.
 Johnson v. Sumner, 386.
 Johnson v. Tompkins, 273.
 Johnson & Co. v. Johansen, 542.
 Johnston v. Disbrow, 461.
 Johnston v. District of Columbia, 200.
 Johnston v. Nichols, 502.
 Johnston v. Oregon S. L. & U. N. R. Co., 186.
 Johnston v. Whittemore, 377.
 Johnston Harvester Co. v. Meinherdt, 435, 447.
- John Thompson Grocery Co. v. Phillips, 512.
 John W. Lovell Co. v. Houghton, 332.
 Jonas Glass Co. v. Glass Bottleblowers' Ass'n, 433, 434, 435.
 Jones v. Alabama & V. R. Co., 126.
 Jones v. Baker, 582.
 Jones v. Barmm, 117.
 Jones v. Boyce, 90.
 Jones v. Cody, 438.
 Jones v. Commercial Travelers' Mut. Acc. Ass'n, 410.
 Jones v. Co-operative Ass'n of America, 535.
 Jones v. Crow, 579.
 Jones v. Diver, 309.
 Jones v. Edwards, 403.
 Jones v. Forehand, 334.
 Jones v. Fort, 378.
 Jones v. Gwynn, 481.
 Jones v. Hannovan, 72, 73.
 Jones v. Hoar, 27.
 Jones v. Leopold, 32.
 Jones v. Leslie, 428.
 Jones v. Littler, 309.
 Jones v. Loving, 141.
 Jones v. Maher, 434, 435.
 Jones v. Minneapolis & St. L. R. Co., 529.
 Jones v. Monson, 459, 464, 583.
 Jones v. Texas & P. R. Co., 74.
 Jones v. Thompson, 399.
 Jones v. Van Winkle Gin & Mach. Works, 434.
 Jones v. Wagner, 516.
 Jones v. Williams, 572.
 Jones v. Williamsburg, 200.
 Jones, Varnum & Co. v. Townsend's Adm'r, 338.
 Joralemon v. Pomeroy, 309, 313.
 Jordan v. Hanson, 144.
 Jordan v. Helwig, 567, 568.
 Jordan v. Pickett, 407.
 Jordan, Manning & Co. v. Wells, 355.

[The figures refer to pages]

- | | |
|--|--|
| <p>Joseph Schlitz Brewing Co. v. Shiel, 568.
 Josselyn v. McAllister, 170.
 Joy v. Metcalf, 497.
 Juan F. Portuondo Cigar Mfg. Co. v. Vicente Portuondo Cigar Co., 440.
 Judd v. Walker, 284, 399.
 Judson v. Central Vermont R. Co., 532, 533.
 Judson v. Cook, 230.
 Judson v. Giant Powder Co., 537.
 Junction City Lumber Co. v. Sharp, 574.
 Junkermann v. Tilyou Realty Co., 502.
 Jutte v. Hughes, 515.</p> <p style="text-align: center;">K</p> <p>Kaare v. Troy Steel & Iron Co., 186.
 Kahl v. Love, 140.
 Kaiser v. Nummerdor, 408.
 Kalbfleisch v. Long Island R. Co., 543.
 Kalis v. Shattuck, 228.
 Kalus v. Bass, 511.
 Kane v. Chester Traction Co., 126.
 Kansas v. Colorado, 136.
 Kansas Cent. R. Co. v. Fitzsimmons, 506.
 Kansas City v. Slangstrom, 232.
 Kansas City, Ft. S. & G. R. Co. v. Morrison, 530.
 Kansas City, Ft. S. & M. R. Co. v. Becker, 16.
 Kansas City, Ft. S. & M. R. Co. v. Kirksey, 37.
 Kansas City Star Co. v. Carlisle, 321.
 Kansas Pac. R. Co. v. Muhlman, 129.
 Kansas Pac. R. Co. v. Whipple, 500.
 Karasek v. Peier, 68.</p> | <p>Karges Furniture Co. v. Amalgamated Woodworkers' Local Union No. 131, 434, 583.
 Kathan v. Comstock, 401.
 Katzenstein v. Raleigh & G. R. Co., 31.
 Katzenstein v. Reid, Murdock & Co., 404.
 Kavanaugh v. Barber, 562.
 Keane v. Boycott, 446.
 Kearney v. Clutton, 377.
 Kearney v. Davin, 418.
 Kearney v. London B. & S. O. R. Co., 537.
 Keating v. Michigan Cent. R. Co., 213.
 Keats v. Earl of Cadogen, 402.
 Kebbe v. Connecticut Co., 531.
 Keeler v. Lederer Realty Corp., 503, 558.
 Keeler v. Seaman, 405.
 Keen v. Coleman, 167.
 Keep v. National Tube Co., 520.
 Keepers and Governors, etc., of Harrow School v. Alderton, 391.
 Keesham v. Elgin, A. & S. Traction Co., 549.
 Kehl v. Abram, 401, 409.
 Kehoe v. Allentown & L. V. Traction Co., 540.
 Keith v. Johnson, 153.
 Keleher v. Putnam, 107, 286.
 Kellam, Matter of, 284.
 Kellar v. James, 168.
 Kelleher v. Schmitt & Henry Mfg. Co., 215.
 Keller v. American Bottlers' Pub. Co., 344.
 Keller v. Halsey, 386.
 Keller v. Harrison, 40.
 Keller v. St. Louis, 470.
 Kelley v. Boston, 202.
 Kelley v. Dillon, 321.
 Kellogg v. Chicago & N. W. R. Co., 543.</p> |
|--|--|

[The figures refer to pages]

- Kellogg v. Church Charity Foundation of Long Island**, 206, 551.
Kellogg v. King, 359.
Kellogg v. New York Cent. & H. R. Co., 122.
Kelly v. Bemis, 139.
Kelly v. Chicago, M. & St. P. R. Co., 66.
Kelly v. Louisville & N. R. Co., 126.
Kelly v. Manhattan R. Co., 531.
Kelly v. New York, 217.
Kelly v. O'Malley, 331.
Kelly v. Partington, 318.
Kelly v. Riley, 120.
Kelly v. Tinling, 323.
Kelsey v. Bank of Mansfield, 373.
Kelsey v. Griswold, 130.
Kemp v. Division No. 241, Amalgamated Ass'n S. & E. Ry. Employés, 429, 433.
Kempf v. Spokane & I. E. R. Co., 526.
Kendall v. Drake, 258.
Kendall v. Stone, 419, 421.
Kendrick v. Cypert, 488.
Kendrick v. McCrary, 469.
Kennard v. Burton, 467.
Kennedy v. Barnett, 46.
Kennedy v. Chase, 182.
Kennedy v. Gifford, 342.
Kennedy v. Merrimack Pav. Co., 185.
Kennedy v. New York, 202.
Kennedy v. Press Pub. Co., 420.
Kennedy v. State, 284.
Kenny v. Baltimore & O. R. Co., 467, 468.
Kensington Com'rs v. Philadelphia County, 136.
Kent v. Bongartz, 335.
Kentucky Heating Co. v. Hood, 64.
Kentucky Land & Immigration Co. v. Crabtree, 354.
Kentucky & I. Bridge & R. Co. v. Shrader, 525.
Kenyon v. Hart, 349.
Kepperly v. Ramsden, 217.
Ker v. Bryan, 355.
Kernan v. Humble, 454.
Kerr v. Brookline, 202.
Kerr v. Sharp, 357, 358.
Kerr v. Shurtleff, 401.
Kerrains v. People, 270.
Kersting v. White, 334.
Kerwin v. Balhatchett, 373.
Ketcham v. Cohn, 67.
Ketchum v. Newman, 361.
Keyes v. Devlin, 260.
Keyser v. Chicago & G. T. R. Co., 36.
Keyworth v. Hill, 167.
Kharas v. Collier, 207.
Khron v. Brock, 224.
Kidney v. Stoddard, 403.
Kiefer v. Grand Trunk R. Co., 245.
Kilbourn v. Thompson, 138, 140.
Kilgour v. Evening Star Newspaper Co., 303.
Kimball v. Bangs, 399.
Kimball v. Bates, 488.
Kimball v. Harman, 583.
Kimball v. Post Pub. Co., 331.
Kimber v. Press Ass'n, 329.
Kimber v. Young, 411, 415.
Kimble v. Kimble, 335.
Kimmis v. Stiles, 315.
Kinaston v. Moore, 374.
Kincaid v. Hardin Co., 203.
Kincaid v. Price, 398.
King v. Alme, 295.
King v. Barnes, 476.
King v. Franklin, 272, 285.
King v. Journeymen Tailors, 428.
King v. Livingston Mfg. Co., 408.
King v. Morris & E. R. Co., 75, 560.
King v. Orser, 367.
King v. Patterson, 335, 338.
King v. Pedley, 568.
King v. Southern R. Co., 467, 470.
King v. Waring, 115.

[The figures refer to pages]

- King v. White, 409.
 Kingman v. Pierce, 372.
 Kinner v. Lake Shore & M. S. R. Co., 454.
 Kinney v. Dodge, 401.
 Kinney v. Koopman, 36.
 Kinney v. Scarbrough Co., 447.
 Kinsley v. Lake Shore & M. S. R. Co., 530.
 Kirby v. Foster, 267.
 Kirby v. President, etc., of Delaware & H. Canal Co., 236.
 Kirby v. Union Pacific R. Co., 450, 454.
 Kirchner v. New Home Sewing Mach. Co., 126.
 Kirk & Son v. Garrett, 226, 275.
 Kirkpatrick v. Eagle Lodge No. 32, 331, 333, 339.
 Kirkwood v. Miller, 231.
 Kirland v. State, 257.
 Kissam v. Roberts, 356.
 Kissel v. Lewis, 562.
 Kistler v. Hereth, 129.
 Kitchen v. Greenabaum, 111.
 Kithcart v. Kithcart, 137.
 Kitson v. Farwell, 397.
 Klatt v. N. C. Foster Lumber Co., 34, 36.
 Klauber v. American Exp. Co., 529.
 Kleebauer v. Western Fuse & Explosives Co., 87.
 Klein v. Garvey, 35.
 Kleinberg v. Schween, 503.
 Klenberg v. Russell, 521.
 Klinck v. Colby, 315, 332, 339, 340.
 Kline v. Abraham, 187.
 Kline v. Kline, 82, 86.
 Klipper v. Coffey, 114.
 Kloos v. Gatz, 375.
 Klos v. Zahorik, 323.
 Klous v. Hennessey, 9.
 Knapp v. Barrett, 534.
 Knapp v. Chicago, B. & Q. R. Co., 483.
 Knapp v. Doll, 503.
 Knapp v. Hortung, 364.
 Knapp v. Wing, 465.
 Knell v. Briscoe, 144.
 Knickerbocker Ice Co. v. Gardner Dairy Co., 450.
 Knickerbocker Life Ins. Co. v. Ecclesine, 135.
 Knierlem v. New York Cent. & H. R. R. Co., 530.
 Knight v. Blackford, 317.
 Knight v. Gibbs, 318.
 Knight v. Sackett & Wilhelms Lithographing Co., 382.
 Knight v. West Jersey R. Co., 248, 249.
 Knight v. Wilcox, 469.
 Knisley v. Pratt, 187.
 Knott v. Digges, 363.
 Knour v. Wagoner, 363.
 Knowlden v. Guardian Printing & Publishing Co., 82.
 Knowles v. Davis, 147.
 Knowlton v. Erie R. Co., 252.
 Knupfle v. Knickerbocker Ice Co., 34, 534.
 Koch v. Fox, 220.
 Kock v. Burgess, 453, 455.
 Koehler v. New York Steam Co., 192.
 Koelsch v. Philadelphia Co., 98, 351.
 Koenig v. Ritchie, 332.
 Koenke v. Bauer, 471.
 Koepke v. Peper, 112.
 Koerber v. Patek, 501.
 Koestel v. Cunningham, 501.
 Kohlhoss v. Mobley, 461.
 Kohn v. Lovett, 503.
 Kolka v. Jones, 479.
 Kompass v. Light, 486, 487.
 Konkle v. Haven, 299.
 Koplitz v. St. Paul, 552.
 Kopplekom v. Colorado Cement-Pipe Co., 506.
 Kosminsky v. Goldberg, 166.
 Kountze v. Kennedy, 412.

[The figures refer to pages]

Kowing v. Manly, 167.
 Krahm v. J. L. Owens Co., 520.
 Kraljer v. Snare & Triest Co., 537.
 Kramer v. Lott, 481.
 Kramer v. Ricksmeler, 254.
 Krause v. Spiegel, 481.
 Krebs v. Oliver, 307, 335, 336.
 Krenzer v. Pittsburg, O., O. & St. L. R. Co., 544.
 Kroeger v. Pitcairn, 414.
 Kroessin v. Keller, 466.
 Krom v. Schoonmaker, 162, 164.
 Kromer v. Helm, 120.
 Krueger v. Bartholomay Brewing Co., 177.
 Krug v. Pitass, 237.
 Krug v. Ward, 488.
 Krumm v. Beach, 418.
 Kruse v. Rabe, 337.
 Kudik v. Lehigh Val. R. Co., 184.
 Kuelling v. Roderick Lean Mfg. Co., 21, 93, 395, 402, 518.
 Kuhn v. Jewett, 80.
 Kuhne v. Ahlers, 315.
 Kujek v. Goldman, 50, 395, 418.
 Kunz v. Troy, 554.
 Kuper v. Snethen, 416.
 Kyle v. Gray, 377.
 Kyne v. Wilmington & N. R. Co., 554.

L

Labadie v. Hawley, 171.
 Lacey v. Porter, 489.
 Lackland v. North Missouri R. Co., 576.
 Ladd v. Granite State Brick Co., 565.
 Ladd v. Pigott, 408.
 Ladner v. Balsley, 408.
 Lady Arundell v. Phipps, 360.
 Lafferty v. Third Ave. R. Co., 554.
 Laffery v. United States Gypsum Co., 178, 216.
 La Flam v. Missiquoi Pulp Co., 542.
 Lafone v. Smith, 344.

Laidlaw v. Sage, 57, 101.
 Laing v. Nelson, 340, 356.
 Laird v. Connecticut & P. R. Co., 241.
 Laird v. Taylor, 488.
 Lake v. Milliken, 98.
 Lake Shore & M. S. R. Co. v. Lavalley, 184.
 Lake Shore & M. S. R. Co. v. Miller, 532.
 Lake Shore & M. S. R. Co. v. Stupak, 183.
 Lake Superior Iron Co. v. Erickson, 178.
 Lamb v. Day, 358.
 Lamb v. Stone, 9.
 Lambert v. Bessey, 54.
 Lammers v. Great Northern R. Co., 554.
 Lamprey v. Danz, 359.
 Lancaster v. Connecticut Mut. Life Ins. Co., 216.
 Lancaster v. Hamburger, 66.
 Lancaster County Bank v. Albright, 402.
 Landau v. New York, 202.
 Lander v. Hall, 389.
 Lander v. Seaver, 271.
 Landers v. Smith, 476.
 Lane v. Atlantic Works, 89.
 Lane v. Bolcourt, 16.
 Lane v. Bryant, 168.
 Lane v. Cotton, 171.
 Lane v. Cox, 502.
 Lane v. Ruhl, 269.
 Langabaugh v. Anderson, 515.
 Langdon v. New York, L. E. & W. R. Co., 247.
 Lange v. Benedict, 144, 146.
 Langford v. Boston & A. R. Co., 281, 490.
 Langford v. U. S., 197.
 Langley v. Augusta, 200.
 Langridge v. Levy, 22, 395, 404.
 Langton v. Hagerty, 303.
 Laning v. New York Cent. R. Co., 182.

[The figures refer to pages]

- Lankford v. Green, 354.
 Lannen v. Albany Gaslight Co., 213.
 Lanpher v. Clark, 322.
 Lanpher v. Dewell, 145.
 Lapham v. Curtis, 513.
 La Pierre v. Chicago & G. T. R. Co., 179.
 La Riviere v. Pemberton, 552.
 Larkin v. O'Neill, 510.
 Larmore v. Crown Point Iron Co., 508.
 Larned v. Wheeler, 67, 72.
 Larsen v. Home Tel. Co., 222.
 Larson v. Chase, 82.
 Larson v. Dawson, 373.
 Larson v. Fidelity Mut. Life Ass'n, 213.
 Larson v. Furlong, 572, 573.
 Larson v. Williams, 395.
 Larue v. Farren Hotel Co., 511.
 Lary v. Cleveland, C., C. & I. R. Co., 503.
 Lasky v. Canadian Pac. R. Co., 532.
 Lathrop v. Sundberg, 336, 338.
 Latter v. Braddell, 115.
 Laubheim v. De Koninglyke N. S. Co., 206.
 Lauzon v. Charroux, 479.
 La Veer v. Hanke Iron & Wire Works, 511.
 Laverty v. Snethen, 16, 370, 379.
 Laverty v. Vanarsdale, 582.
 Lavery v. Crooke, 469.
 Lawall v. Groman, 11, 16, 17.
 Lawler v. Fritcher, 469.
 Lawless v. Anglo-Egyptian Cotton Co., 334.
 Lawlor v. Loewe, 442.
 Lawlor v. Magnolia Metal Co., 491.
 Lawrence v. Cleary, 485.
 Lawrence v. Hagerman, 477.
 Lawrence v. Herald Pub. Co., 343, 344.
 Lawton v. Cardell, 358.
 Lawton v. Steele, 110.
 Lawyer v. Fritcher, 469.
 Lawyers' Co-op. Pub. Co. v. West Pub. Co., 330.
 Layman v. F. F. Slocomb & Co., 387.
 Leach v. Lynch, 363.
 Leach v. Woods, 354.
 Leachman v. Dougherty, 156.
 Leame v. Bray, 54.
 Leather Cloth Co. v. Hirshfeld, 42.
 Leavitt v. Seaney, 399.
 Lebourdais v. Vitrified Wheel Co., 519.
 Ledwich v. McKim, 32.
 Lee v. Gansel, 153.
 Lee v. Hefley, 158.
 Lee v. Hodges, 469.
 Lee v. Kendall, 581.
 Lee v. Troy Citizens' Gas Light Co., 556.
 Leedom v. J. M. Ward Furniture, Stove & C. Co., 397.
 Leeds v. New York Tel. Co., 87, 100.
 Le Forest v. Tolman, 250.
 Lefrois v. Monroe County, 201.
 Legris v. Marcotte, 455.
 Lehigh & Wilkes-Barre Coal Co. v. Hayes, 179.
 Lehman, Durr & Co. v. Shackelford, 361.
 Leicester (Earl of) v. Walter, 342.
 Leichtweiss v. Treskow, 158.
 Leidy v. Carson, 373.
 Leighton v. Sargent, 527.
 Leitzell v. Delaware, L. & W. R. Co., 540.
 Leland v. Hathorn, 241.
 Le Lievre v. Gould, 411.
 Le Massena v. Storm, 420.
 Lembeck v. Gerken, 406.
 Lemberston v. Dunham, 412.
 Lemmon v. Webb, 572.
 Lemon v. Simmons, 308.
 Lenderink v. Rockford, 223.

[The figures refer to pages]

- Leonard v. Columbia Steam Nav. Co., 244, 250.
 Leonard v. Herrmann, 179.
 Leonard v. Tidd, 377.
 Leonard v. Whetstone, 455.
 Leonard v. Wilkins, 364.
 Leone v. Kelly, 522.
 Leroy v. Springfield, 131.
 Le Roy Fibre Co. v. Chicago, M. & St. P. R. Co., 543.
 Lesch v. Great Northern R. Co., 366.
 Leslie v. Lewiston, 554.
 Letts v. Kessler, 49, 68.
 Levert v. Daily States Pub. Co., 295.
 Levie v. Booth, 377.
 Levie v. Pickard, 410.
 Levin v. Burlington, 109.
 Levister v. Southern R. Co., 123.
 Levy v. Brothers, 68.
 Levy v. New York, 200.
 Lexington & O. R. Co. v. Kidd, 356, 383.
 Lexow v. Julian, 397, 400.
 Lewis v. Broun, 498.
 Lewis v. Hawley, 309.
 Lewis v. Hudson, 304.
 Lewis v. Huie-Hodge Lumber Co., 439.
 Lewis v. Jewell, 400.
 Lewis v. Levy, 329.
 Lewis v. Palmer, 155.
 Lewis v. Pennsylvania R. Co., 526.
 Lewis v. Read, 235.
 Lewis v. State, 269.
 Lewis v. Stein, 578.
 Lewis v. Terry, 93, 518.
 Lewless v. Detroit, G. H. & M. R. Co., 127.
 Ley v. Metropolitan Life Ins. Co., 896.
 Libaire v. Minneapolis & St. L. R. Co., 462.
 Libellis Famosis Case, 298.
 Lichtenwallner v. Laubach, 263.
 Like v. McKinstry, 420.
 Lillibridge v. McCann, 80.
 Lillienkamp v. Rippetoe, 135.
 Liming v. Illinois Cent. R. Co., 551.
 Lincoln v. Gay, 527.
 Lincoln v. Hapgood, 67, 72, 151.
 Lind v. San Luis Obispo, 562.
 Linda v. Hudson, 115.
 Lindler v. Southern Ry., 535.
 Lindley v. Horton, 315.
 Lindsay & Co. v. Montana Federation of Labor, 429.
 Lindstrand v. Delta Lumber Co., 176.
 Line v. Spies, 301.
 Linn v. Ross, 227.
 Linnehan v. Rollins, 222.
 Linnen v. Banfield, 285.
 Linton v. Hurley, 137, 226.
 Lipe v. Eisenlerd, 470.
 Lister v. Wright, 241.
 Litchfield v. Bond, 197.
 Litchfield v. Hutchinson, 415.
 Little v. Barlow, 300.
 Little v. Barreme, 138.
 Little v. Chicago, St. P., M. & O. R. Co., 241.
 Little v. Hackett, 551.
 Little v. Holyoke, 202.
 Little v. Madison, 203.
 Little Rock Gas & Fuel Co. v. Coppedge, 461.
 Little Schuylkill Nav. R. & Coal Co. v. Richards' Adm'r, 233.
 Livermore v. Batchelder, 364.
 Livingston v. Bishop, 237.
 Livingston v. Cox, 226.
 Livingston v. Jefferson, 240.
 Livingston v. Livingston, 358.
 Lloyd v. New York, 199.
 Locke v. State, 197.
 Locke v. Stearns, 226.
 Lockenour v. Sides, 480.
 Lockhart v. Bear, 494, 495.
 Lockwood v. Lockwood, 465.
 Lockwood v. Lunsford, 359.

[The figures refer to pages]

- Loewer v. Harris, 403, 410.
 Lohmiller v. Indian Ford Water Power Co., 567.
 Lohse Patent Door Co. v. Fuelle, 431, 443.
 Loker v. Damon, 88, 365.
 Lombard v. Lennox, 317.
 Lomerson v. Johnston, 410.
 London Guarantee Co. v. Horn, 449.
 London Guarantee & Acc. Co. v. Horn, 428.
 Long v. Buchanan, 361.
 Long v. Morrison, 133.
 Long v. Rucker, 419.
 Long v. Warren, 408.
 Long v. Woodman, 397.
 Longa v. Stanley Hod Elevator Co., 176.
 Longfellow v. Quimby, 365.
 Longley v. McGeoch, 568.
 Longshore Printing Co. v. Howell, 430.
 Lonstorf v. Lonstorf, 465.
 Look v. Dean, 286.
 Loomis v. Hollister, 212.
 Lorah v. Rinehart, 533.
 Lord v. De Witt, 563.
 Lord v. Langdon, 68.
 Lord v. Lord, 460.
 Lord v. Tiffany, 237.
 Lord v. Wormwood, 347.
 Lord Pike v. Heneage, 378.
 Lorimer v. St. Paul City R. Co., 179.
 Losee v. Buchanan, 55, 56, 513, 515.
 Losee v. Clute, 20.
 Lothrop v. Adams, 226, 331, 343.
 Lothrop v. Thayer, 392.
 Lott v. Leventhal, 368.
 Lott v. Swezey, 40.
 Lottman v. Barnett, 173.
 Loubz v. Hafner, 352.
 Loudoun v. Eighth Ave. R. Co., 539.
 Lough v. Davis, 173, 174.
 Lough v. Outerbridge, 439.
 Loughran v. Des Moines, 574.
 Louisiana Mut. Ins. Co. v. Tweed, 77.
 Louisville, N. A. & C. R. Co. v. Bryan, 500.
 Louisville, N. A. & C. R. Co. v. Nitsche, 96.
 Louisville, N. A. & C. R. Co. v. Shanks, 500.
 Louisville, N. A. & C. R. Co. v. Stommel, 552.
 Louisville & J. Ferry Co. v. Nolan, 79.
 Louisville & N. R. Co. v. Arp, 547.
 Louisville & N. R. Co. v. Davis, 182.
 Louisville & N. R. Co. v. East Tennessee, V. & G. R. Co., 544.
 Louisville & N. R. Co. v. Ginley, 176.
 Louisville & N. R. Co. v. Graham's Adm'r, 245.
 Louisville & N. R. Co. v. Hughes, 215.
 Louisville & N. R. Co. v. Hurt, 503.
 Louisville & N. R. Co. v. Logsdon's Adm'r, 505.
 Louisville & N. R. Co. v. McCoy, 524.
 Louisville & N. R. Co. v. Orr, 90.
 Louisville & N. R. Co. v. Pendleton's Adm'r, 176, 177.
 Louisville & N. R. Co. v. Ray, 507.
 Louisville & N. R. Co. v. Richards, 532.
 Louisville & N. R. Co. v. Spinks, 2.
 Louisville & N. R. Co. v. Warfield & Lee, 528, 529.
 Louisville & N. R. Co. v. Williams, 250.
 Lounsbury v. Foss, 564.
 Louthan v. Hewes, 219.

[The figures refer to pages]

Love v. Atlanta, 201.
 Loveland v. Burke, 530.
 Lovell v. Hammond Co., 372.
 Lovell v. Howell, 191.
 Lovell Co. v. Houghton, 332.
 Low v. Elwell, 269.
 Lowe v. Hendrick, 418.
 Lowe v. Wartman, 489.
 Lowenthal v. Hodge, 476.
 Lowery v. Cate, 160.
 Lowery v. Manhattan R. Co., 91.
 Lowry v. Vedder, 339.
 Lowther v. Radnor (Earl), 148.
 Luby v. Bennett, 477, 479, 480,
 490, 492, 493.
 Lucas v. Trumbull, 388.
 Lucke v. Clothing Cutters' &
 Trimmers' Assembly, 431, 433.
 Lucker v. Liske, 33.
 Luddington v. Peck, 46.
 Ludlow v. Hudson River R. Co.,
 131.
 Ludlum v. McCuen, 305.
 Lueck v. Helsler, 481.
 Luick v. Arends, 464.
 Lumby v. Allday, 311, 312.
 Lumley v. Gye, 445.
 Lundin v. Post Pub. Co., 329.
 Lunt v. Brown, 356.
 Lunt v. Post Printing & Publish-
 ing Co., 508.
 Luse v. Jones, 366, 368.
 Lusk v. Belote, 528.
 Lusted v. Chicago & N. W. R. Co.,
 125.
 Lyford v. Toothaker, 353.
 Lynch v. Metropolitan El. R. Co.,
 207, 210, 273, 286.
 Lynch v. Nurdin, 92.
 Lyne v. Nichols, 420.
 Lyon v. Rood, 352.
 Lyons v. Allen, 123.
 Lyons v. Desotelle, 114.
 Lyons v. Erie R. Co., 540.
 Lyons v. Merrick, 58.
 Lyons v. New York City R. Co.,
 461.

Lyons v. Wilkins, 444.
 Lyttle v. Denny, 528, 537.

M

Mabardy v. McHugh, 399.
 Mabry v. Kettering, 291.
 McAdoo v. Richmond & D. R. Co.,
 524.
 McAleer v. Horsey, 395, 411.
 McAleer v. McMurray, 62.
 McAlpine v. Laydon, 180.
 McAndrews v. Burns, 193.
 McAndrews v. Collerd, 559, 577.
 McAroy v. Wright, 418.
 McArthur v. Green Bay & M.
 Canal Co., 138.
 Macauley Bros. v. Tierney, 440.
 McBee v. Fulton, 328, 329.
 McBride v. Ledoux, 335.
 McBride v. Lynd, 347.
 McBride v. Scott, 124.
 McCabe v. Berge, 167.
 McCabe v. Desnoyers, 412.
 McCabe v. O'Connor, 159.
 McCafferty v. Spuyten Duyvil &
 P. M. R. Co., 217.
 McCaffrey v. Mossberg & Gran-
 ville Mfg. Co., 519.
 McCahill v. John H. Parker Co.,
 347.
 McCall v. Cohen, 147.
 McCall v. Pacific Mail S. S. Co.,
 178.
 McCampbell, Figg & Burnett v.
 Louisville & N. R. Co., 529.
 McCandless v. McWha, 17.
 McCann v. Strang, 563.
 McCardle v. McGinley, 479.
 McCarroll v. Stafford, 107.
 McCarthy v. Boston & Lowell R.
 Corp., 470.
 McCarthy v. De Armit, 284.
 McCarthy v. Kitchen, 487.
 McCarthy v. Mulgrew, 185.
 McCarthy v. Syracuse, 152.
 McCarthy v. Timmins, 212.
 McCarthy v. Weir, 489.

[The figures refer to pages]

- McCarty v. Lambley, 332.
 McClafferty v. Philp, 482.
 McClain, Ex parte, 110.
 McCloskey v. Powell, 61.
 McClung v. Dearborne, 213.
 McClure v. McClintock, 455.
 McClure v. Review Pub. Co., 339.
 McColligan v. Pennsylvania R. Co., 227.
 McColman v. Wilkes, 353.
 McCord v. High, 153.
 McCormick v. Burt, 150, 151.
 McCormick v. Pennsylvania Cent. R. Co., 134, 379, 380.
 McCormick v. Sisson, 490.
 McCoy v. Gas Engine & Power Co., 498.
 McCoy v. K. & D. M. R. Co., 529.
 McCoy v. McCoy, 342.
 McCoy v. Trucks, 287.
 McCreedy v. Phillips, 397.
 McCruden v. Rochester R. Co., 368.
 McCubbin v. Hastings, 518.
 McCue v. Klein, 115.
 McCune v. Norwich City Gas Co., 66.
 McCutchen v. Currier, 129.
 McDavids v. Blevins, 482.
 McDermott v. Boston, 183.
 Macdonald v. De Fremery, 405.
 McDonald v. Hovey, 129.
 McDonald v. Mallory, 250.
 McDonald v. Massachusetts General Hospital, 204, 205.
 McDonald v. Michigan Cent. R. Co., 180.
 McDonald v. Nugent, 308.
 McDonald v. Smith, 398.
 McDonald v. Snelling, 93.
 McDonald v. Standard Oil Co., 186.
 MacDonald v. Sun Printing & Publishing Ass'n, 325.
 McDonald v. Woodruff, 343.
 McDonnell v. Pittsfield & N. A. R. Corp., 347.
 McDonough v. Gilman, 569, 570.
 McDonough v. Williams, 418.
 McDougald v. Coward, 163.
 McDowell v. Bowles, 316.
 McElligott v. Randolph, 182.
 McElroy v. Capron, 166, 167.
 McEntee v. New Jersey Steamboat Co., 380.
 McFadden v. Jewell, 201.
 McGarr v. National & Providence Worsted Mills, 470, 471.
 McGettigan v. Potts, 516.
 McGhee v. Bell, 399.
 McGhee v. Norfolk & S. R. Co., 87.
 McGill v. Maine & N. H. Granite Co., 177.
 McGill v. Pintsch Compressing Co., 565.
 McGinley v. Alliance Trust Co., 502.
 McGonigle v. Atchison, 243.
 McGorty v. Southern New England Tel. Co., 182.
 McGovern v. Interurban R. Co., 134.
 McGrath v. Texas & P. R. Co., 187.
 McGraw v. Baltimore & O. R. Co., 530.
 McGuinness v. Hargiss, 421.
 McGuire v. Bell Tel. Co., 181.
 McGuire v. Gerstley, 456.
 McGuire v. Grant, 516.
 McGuire v. Western Morning News Co., 324.
 McGurk v. Cronenwett, 446, 448.
 Machado v. Fontes, 241, 250, 251.
 McHugh v. Schlosser, 272.
 McIntosh v. Bullard, 280.
 McIntyre v. Sholty, 162, 164.
 McIntyre v. Southern R. Co., 233.
 McIntyre v. Whitney, 386, 387.
 Mack v. Sharp, 484.
 Mack v. Wright, 34.
 Mackall v. Ratchford, 435.
 McKay v. Atlantic Coast Line R. Co., 551.

[The figures refer to pages]

- McKay v. Southern Bell Telegraph & Telephone Co., 282.
 McKay v. Syracuse Rapid Transit R. Co., 553.
 McKay v. Woodle, 40.
 McKee v. Ingalls, 165.
 McKee v. Rudd, 405.
 McKee v. Wilson, 307, 310.
 McKelvey v. McKelvey, 133.
 McKelvey v. Marsh, 145, 149.
 McKenna v. Flisk, 242.
 McKenzie v. Hardinge, 473.
 McKeon v. See, 558.
 Mackie v. Heywood & Morrill Rattan Co., 361.
 McKinney v. Chicago & N. R. Co., 548.
 McKinney v. Monongahela Nav. Co., 39.
 McKnight v. Hasbrouck, 333.
 McKnight v. Ratcliff, 365.
 McLaine v. Head & Dowst Co., 192.
 McLaughlin v. Cowley, 327.
 McLean v. Fleming, 441.
 Maclean v. Scripps, 339.
 McLeod v. McLeod, 486.
 McLimans v. Lancaster, 184.
 McMahan v. Green, 281.
 McMahan v. People, 284.
 McMahan v. Sankey, 33.
 McManamon v. Hanover Township, 555.
 McMichael v. McKeon, 154.
 McMillan v. Birch, 311.
 McMillan v. Reaume, 418.
 McNally v. Burleigh, 339.
 McNamara v. Goldan, 301.
 McNary v. Chamberlain, 21.
 McNay v. Stratton, 274.
 Macon Ry. & Light Co. v. Castopulon, 525.
 McPheeters v. Hannibal & St. J. R. Co., 524.
 MacPherson v. Buick Motor Co., 519.
 McPherson v. James, 363.
 McRickard v. Flint, 36.
 Macrow v. Great Western R. Co., 530.
 McTavish v. Carroll, 120.
 McVey v. Manatt, 237.
 Madden v. Brown, 267.
 Madigan v. Oceanic Steam Nav. Co., 192.
 Magar v. Hammond, 500, 503.
 Mageau v. Great Northern R. Co., 461.
 Magee v. Holland, 467, 468.
 Magowan v. Rickey, 486.
 Maguinay v. Saudek, 471.
 Mahoney v. Belford, 341.
 Mahoney v. Roberts, 450.
 Mains v. Whiting, 308.
 Mairs v. Baltimore & O. R. Co., 7, 34.
 Mairs v. Manhattan Real Estate Ass'n, 346.
 Maitland v. Bramwell, 334.
 Makely v. A. Boothe Co., 243.
 Malachy v. Soper, 419, 421.
 Maliniemi v. Gronlund, 284.
 Mallach v. Ridley, 210.
 Malley Co. v. Button, 403.
 Mallory v. Ferguson, 152.
 Malone v. Belcher, 494, 495.
 Malone v. Topfer, 471.
 Mamer v. Lussem, 216.
 Manchester Mfg. Co. v. Polk, 176.
 Manda v. Orange, 366.
 Maner v. State, 275.
 Manker v. Western Union Tel. Co., 31.
 Mankewicz v. Lehigh Valley R. Co., 533.
 Manley v. Felty, 401.
 Mann v. Belt R. & Stock-Yard Co., 532.
 Mann v. Delaware & H. Canal Co., 182.
 Mann v. Fuller, 502.
 Manning v. Avery, 421.
 Manning v. Keenan, 235.
 Mannville Co. v. Worcester, 243.

[The figures refer to pages]

- Manvell v. Thompson, 468, 471.
 Manzella v. Rochester R. Co., 550.
 Marble v. Chapin, 298.
 Marble v. Ross, 523, 541.
 Marble v. Worcester, 76.
 March v. Bricklayers' & Plasterers' Union, 431.
 Marcus v. Bernstein, 490.
 Marcy v. Parker, 384.
 Mariner v. Smith, 524.
 Marino v. Lehmaier, 534.
 Markely v. Snow, 213.
 Marker v. Dunn, 343.
 Markham v. Brown, 358.
 Markham v. Jaudon, 387.
 Marks v. Baker, 333.
 Marks v. Hastings, 226.
 Marks v. Rochester R. Co., 176.
 Marks v. Townsend, 278, 280, 491.
 Marks' Adm'r v. Petersburg R. Co., 548.
 Marlin Firearms Co. v. Shields, 421.
 Marlow v. Weeks, 352.
 Marquardt v. Ball Engine Co., 519.
 Marri v. Stamford St. R. Co., 461.
 Marriott v. Williams, 237.
 Marsan v. French, 568.
 Marsh v. Billings, 440.
 Marsh v. Ellsworth, 327.
 Marshall v. De Haven, 9.
 Marshall v. Norcross, 194.
 Marshall v. Oakes, 166.
 Marshall v. Seelig, 398, 401.
 Marshall v. Taylor, 287.
 Marshall v. Wabash R. Co., 247.
 Marshall v. Welwood, 513.
 Marshall v. Widdicomb Furniture Co., 180.
 Marston v. Gale, 360.
 Marston v. Reynolds, 511.
 Martens v. Reilly, 453, 583.
 Martin v. Chicago, R. I. & P. R. Co., 570.
 Martin v. Collins, 278.
 Martin v. Davis, 359.
 Martin v. Eagle Development Co., 396.
 Martin v. Hill, 411.
 Martin v. Houghton, 361.
 Martin v. Jewell, 360.
 Martin v. Jordan, 408.
 Martin v. Louisville & J. Bridge Co., 511.
 Martin v. New York & N. E. R. Co., 96.
 Martin v. Pettit, 227.
 Martin v. Pittsburgh Rys. Co., 540.
 Martin v. Robson, 168.
 Martin v. Wharton, 400.
 Martinez v. Gerber, 473.
 Marvin v. Brewster Iron Mining Co., 516.
 Marvin v. Chicago, M. & St. P. R. Co., 80.
 Marx v. Press Pub. Co., 322.
 Maryland Telephone & Telegraph Co. v. Ruth, 364.
 Mask v. Rawls, 481.
 Maskell v. Barker, 480.
 Mason v. O'Brien, 385.
 Mason v. Thompson, 528.
 Mason v. Warner, 241.
 Massee v. Williams, 337, 340.
 Massey v. Luce, 407.
 Master Builders' Ass'n v. Domasclo, 439.
 Match v. Hunt, 410.
 Mateer v. Brown, 528.
 Matheson v. O'Kane, 124, 125.
 Mathews v. Cowan, 161.
 Mathews v. London St. Tramways Co., 97.
 Mathewson v. Fitch, 497.
 Mathis v. Carpenter, 153.
 Matthews v. London St. Tramways Co., 551.
 Matthews v. Shankland, 442, 444.
 Matthews v. Smith's Exp. Co., 356.

[The figures refer to pages]

- Matthews v. Stillwater Gas & Electric Light Co.**, 578.
Matthews v. Tiestel, 364.
Mattice v. Brinkman, 372.
Mattice v. Wilcox, 314.
Mattimore v. Erie, 542.
Mattson v. Minnesota & N. W. R. Co., 554.
Mauk v. Brundage, 340.
Maxmilian v. New York, 201.
Max Morris, The, 44, 542.
May v. Charleston Interurban R. Co., 538.
May v. Loomis, 409.
May v. Wood, 426.
Maye v. Yappen, 61, 348.
Mayer v. Salazar, 412.
Mayer v. Schleichter, 313.
Mayer v. Thompson-Hutchison Bldg. Co., 172, 233.
Mayhew v. Burns, 168.
Maynard v. Beardsley, 344.
Maynard v. Boston & M. R. Co., 503.
Maynard v. Fireman's Fund Ins. Co., 207.
Maynard v. Maynard, 404.
Mayo v. Springfield, 366.
Mayor, etc., of Birmingham v. McCary, 219.
Mayor, etc., of Bradford v. Pickles, 69.
Mayor & Alderman of Birmingham v. Land, 578.
Mead v. Baum, 502.
Mead .. Bunn, 409.
Mead v. Pollock, 364.
Meagher v. Driscoll, 82, 366.
Mealey v. Bemidji Lumber Co., 445, 449.
Mecum v. Mooyer, 398.
Medford v. Levy, 559.
Meeker v. Post Printing & Publishing Co., 329.
Meeker v. Van Rensselaer, 106, 573.
Meeks v. Dewberry, 498.
Meers v. McDowell, 526.
Meltzner v. Baltimore & O. R. Co., 505.
Melcher v. Beeler, 334.
Melcher v. Scruggs, 156.
Melia v. Neate, 488.
Melker v. New York, 557, 564.
Mellor v. Merchants' Mfg. Co., 176.
Mellor v. Spateman, 72.
Memphis Consol. Gas & Electric Co. v. Simpson, 541.
Memphis Keeley Institute v. Leslie E. Keeley Co., 112.
Memphis & C. Packet Co. v. Nagel, 25.
Memphis & C. R. Co. v. Martin, 500.
Memphis & C. R. Co. v. Reeves, 81.
Menteer v. Scalzo Fruit Co., 511.
Mercer v. Corbin, 258.
Mercereau v. Bergen, 270.
Merchants' Ins. Co. v. Buckner, 299.
Merchants' & Planters' Nat. Bank v. Trustees Masonic Hall, 372.
Merivale v. Carson, 323, 325, 326.
Merrey v. Guardian Printing & Publishing Co., 322, 339, 340.
Merrick v. Britton, 355.
Merrifield v. Worcester, 200.
Merrill v. Grinnell, 530.
Merrills v. Tariff Mfg. Co., 207.
Merritt v. Earle, 529.
Merryweather v. Nixan, 238.
Mershon v. Hobensack, 16.
Mertens v. Bee Pub. Co., 337.
Merwin v. Backer, 354.
Metcalf v. Alley, 496.
Metcalf v. McLaughlin, 170.
Metcalf v. Times Pub. Co., 329, 330.
Meteye v. Times-Democrat Pub. Co., 331.
Metzger v. Hochrein, 68.

[The figures refer to pages]

- Mexican Cent. R. Co. v. Gehr, 244.
Meyer v. Doherty, 372.
Meyer v. Milwaukee Electric R. & Light Co., 101.
Meyrose v. Adams, 419, 420.
Michael v. Dunkle, 460.
Michael v. Matson, 487.
Michaelson v. Denison, 272.
Michalson v. All, 475.
Michigan Cent. R. Co. v. Dolan, 175.
Michigan Ins. Bank v. Eldred, 245.
Middlebrooks v. Mayne, 570.
Middleton v. Nichols, 469, 472.
Middleton v. P. Sanford Ross, Inc., 510.
Middletown v. Nichols, 472.
Midgette v. Branning Mfg. Co., 179.
Mielenz v. Quasdorf, 297, 341, 342.
Mighell v. Johore, 197.
Miles v. Weston, 283.
Milissich v. Lloyds, 330, 341.
Mill v. Hawker, 170.
Millard v. Miller, 232.
Miller v. Baker, 352.
Miller v. Beck, 124.
Miller v. Brinkerhoff, 150.
Miller v. Burch, 573.
Miller v. Casco, 55.
Miller v. David, 313, 317.
Miller v. Fisher, 503.
Miller v. Kirby, 356.
Miller v. Horton, 139.
Miller v. McDonald, 320.
Miller v. Maxwell, 301.
Miller v. Miles, 372.
Miller v. Miller, 353, 464.
Miller v. Milligan, 477.
Miller v. Newell, 137.
Miller v. Parish, 306.
Miller v. St. Louis, I. M. & S. R. Co., 94.
Miller v. Schweitzer, 167.
Miller v. State, 361.
Miller v. Woodhead, 501.
Millers Creek R. Co. v. Barnett, 550.
Mills v. Brooklyn, 141, 142, 150, 151, 200.
Mills v. Mills, 492.
Mills v. United States Printing Co., 429, 430, 447.
Milner v. Maclean, 269.
Milner v. Milnes, 133.
Milwaukee & St. P. R. Co. v. Arms, 501.
Milwaukee & St. P. R. Co. v. Kellogg, 77, 78, 103.
Minasian v. Osborne, 430.
Miner v. Detroit Post & Tribune Co., 323.
Minihan v. Boston Elevated R. Co., 537.
Minnesota v. Barber, 111.
Missouri v. Illinois, 136.
Missouri, K. & T. R. Co. v. Fuller, 122.
Missouri, K. & T. R. Co. v. Haber, 109.
Missouri, K. & T. R. Co. of Texas v. Mott, 577.
Missouri Pac. R. Co. v. Brazzil, 125.
Missouri Pac. R. Co. v. Columbia, 103.
Missouri Pac. R. Co. v. Goodholm, 126.
Mitchell v. Harmony, 108.
Mitchell v. Mitchell, 254.
Mitchell v. Rochester R. Co., 83, 84.
Mitchell v. Rome, 517.
Mitchell v. Sharon, 307.
Mitchell v. State, 282.
Mitchell v. Thomas, 384.
Mitton v. Cargill Elevator Co., 510.
M. Moxham, The, 248.
Mobile Life Ins. Co. v. Brame, 26, 37.
Mobile Life Ins. Co. v. Randall, 2.

[The figures refer to pages]

- Mobile & M. R. Co. v. Clanton,** 169.
Mobile & O. R. Co. v. Ridley, 90.
Mobile & O. R. Co. v. Williams, 348.
Modisett v. McPike, 458.
Moellering v. Evans, 516.
Moens v. Heyworth, 410.
Moffett v. Brewer, 572.
Moffitt v. Asheville, 199.
Moffitt v. Burgess, 475.
Mogul S. S. Co. v. McGregor, 439.
Mohr v. Langan, 377.
Mohr v. Williams, 116.
Moir v. Hopkins, 230.
Monroe v. Atlantic Coast Line R. Co., 509.
Monroe v. Whipple, 14.
Monson v. Lathrop, 298.
Monson v. Tussauds, 293.
Montfort v. Hughes, 233.
Montreal River Lumber Co. v. Mihills, 413.
Moody v. Blake, 376.
Moody v. Drown, 375.
Moody v. Keener, 372.
Moody v. McDonald, 500.
Moody v. Whitney, 374.
Mooney v. Davis, 410.
Mooney v. Miller, 399.
Mooney v. Third Ave. R. Co., 232.
Moore v. Appleton, 238.
Moore v. Crawford, 395.
Moore v. Eastman, 161.
Moore v. Fitchburg R. Corp., 207.
Moore v. Hammons, 459.
Moore v. Howe, 408.
Moore v. Manufacturers' Nat. Bank of Troy, 327.
Moore v. Monroe Refrigerator Co., 379.
Moore v. Pennsylvania R. Co., 505.
Moore v. Rogers, 235.
Moore v. Scott, 415.
Moore v. Thompson, 274.
Morain v. Devlin, 163.
- Moran v. Rockland, T. & C. St. Ry.,** 177.
Morange v. Mix, 152.
Morasse v. Brochu, 317.
More v. Bennett, 300, 303, 316.
More v. Massini, 359.
More v. Ord, 360.
Morehouse v. Cotheal, 390.
Morehouse v. Terrill, 455.
Moreland v. Atchison, 401.
Moreton v. Hardern, 233.
Morey v. Hoyt, 385.
Morey v. Morning Journal Ass'n, 61, 316.
Morgan v. Andrews, 438, 450, 455.
Morgan v. Curley, 82.
Morgan v. Durfee, 263.
Morgan v. Hodge, 417.
Morgan v. Ide, 383.
Morgan v. Martin, 465.
Morgan v. Palmer, 359.
Morgan v. Powell, 348.
Morgan v. Skiddy, 404.
Morgan v. Smith, 189, 446, 448.
Morgan v. Vale of Neath R. Co., 191.
Morley v. Chase, 284.
Morley v. Roach, 386.
Morning v. Long, 461.
Morrill v. Thurston, 147.
Morris v. Columbus, 109.
Morris v. Lake Shore & M. S. R. Co., 551.
Morris v. McClellan, 262.
Morris v. Nugent, 364.
Morris v. Platt, 56.
Morris v. Sailer, 324.
Morris v. Scott, 478, 482.
Morris Canal & Banking Co. v. Ryerson, 570.
Morris Run Coal Co. v. Barclay Coal Co., 583.
Morrisette v. Canadian Pac. R. Co., 247, 249.
Morrison v. Davis, 81.
Morrison v. John L. Stephens, The, 25.

[The figures refer to pages]

- | | |
|--|--|
| <p>Morrison v. Robinson, 366.
 Morrison v. Smith, 303.
 Morrisset v. Eastern R. Co., 505.
 Morse v. Crawford, 162.
 Morse v. Hurd, 352.
 Mortlock v. Buller, 395.
 Morton v. Detroit, B. O. & A. R. Co., 180.
 Morton v. Shoppee, 254.
 Morton v. Western Union Tel. Co., 86.
 Morton v. Young, 485.
 Moseley v. Moss, 305.
 Moseley v. Wilkinson, 384.
 Moser v. Press Pub. Co., 291.
 Moses v. Arnold, 27.
 Moses v. Macferlan, 28.
 Mosher v. Jewett, 362.
 Moss v. Cummings, 140.
 Mostyn v. Fabrigas, 241.
 Mott v. Consumers' Ice Co., 210.
 Moulton v. Beecher, 490.
 Moulton v. Lowe, 496.
 Mountain v. Day, 418.
 Mouse's Case, 107.
 Mower v. Leicester, 203.
 Moxham, The, 248.
 Moyer v. Gordon, 366.
 Moyer v. Lederer, 404.
 Moyle v. Drake, 490.
 Moynihan v. Hills Co., 180.
 Mudge v. West End Brewing Co., 389.
 Mueller v. Fruen, 578.
 Mueller v. Olson, 373.
 Mueller v. Radebaugh, 332.
 Muench v. Heinemann, 508.
 Muetze v. Tuteur, 298.
 Muggridge v. Eveleth, 355.
 Mulchey v. Methodist Religious Soc., 178, 224, 233.
 Mulderig v. Wilkes-Barre Times, 324.
 Muldoon v. Rickey, 479.
 Mullen v. Old Colony R. Co., 126, 127.</p> | <p>Mullen v. Quinlan & Co., 386.
 Muller v. McKesson, 58, 521, 558.
 Mulligan v. Bailey, 410.
 Mulligan v. New York & R. B. R. Co., 211.
 Mulliken v. Miller, 397.
 Mullin v. California Horseshoe Co., 180.
 Multer v. Knibbs, 459.
 Mumford v. Tolman, 398.
 Munden v. Harris, 289.
 Munhall v. Pennsylvania R. Co., 439.
 Munier v. Zachary, 385.
 Munns v. De Nemours, 482, 483.
 Munos v. Southern Pac. R. Co., 245.
 Munster v. Lamb, 327.
 Murdock v. State, 258.
 Murdock v. Walker, 98.
 Murdock, Kerr & Co. v. Walker, 435.
 Murgatroyd v. Robinson, 579.
 Murphy v. Chicago, R. I. & P. R. Co., 556.
 Murphy v. Ernst, 485.
 Murphy v. Fond du Lac, 366.
 Murphy v. Lowell, 217.
 Murphy v. McQuade, 262.
 Murphy v. Martin, 278, 477.
 Murphy v. New York, 217.
 Murphy v. Perlstein, 217.
 Murphy v. State, 260.
 Murphy v. Union R. Co., 525.
 Murphy v. Walters, 281.
 Murray v. Boyne, 259.
 Murray v. Pannaci, 365.
 Muscoe v. Com., 284.
 Musconetcong Iron Works v. Delaware, L. & W. R. Co., 417.
 Mussiller v. Rice, 402.
 Myer v. Hobbs, 217.
 Myers v. Hodges, 340.
 Myers v. Kaichen, 332.
 My Maryland Lodge v. Adt, 443.
 Mynn v. Coughton, 475.</p> |
|--|--|

[The figures refer to pages]

N

- Nachtman v. Hammer, 484.
 Nachtrieb v. Stoner, 355, 356.
 Nanson v. Jacob, 378.
 Nash v. Jewett, 160.
 Nash v. Minnesota Title Insurance & Trust Co., 404, 412.
 Nashua Iron & Steel Co. v. Worcester & N. R. Co., 238.
 Nashville, C. & St. L. Ry. v. Karthaus, 373.
 Nashville, C. & St. L. R. Co. v. McConnell, 451, 454.
 Nashville Lumber Co. v. Bushbee, 506.
 Nason v. Chicago, R. I. & P. R. Co., 126.
 National Cash Register Co. v. Salling, 336.
 National Fireproofing Co. v. Mason Builders' Ass'n, 430.
 National Phonograph Co. v. Edison Bell Consol. Phonograph Co., 455.
 National Protective Ass'n v. Cummings, 429, 430, 433, 447.
 National Savings Bank v. Ward, 20.
 National Tel. News Co. v. Western Union Tel. Co., 454.
 National Trust Co. v. Gleason, 28.
 Naulty v. Bulletin Co., 303.
 Navarino v. Dudrap, 481.
 Nave v. Flack, 510.
 Nazworthy v. Sullivan, 573.
 Neal v. Gillett, 158.
 Neal v. Lewis, 316.
 Neal v. State, 271.
 Neale v. Weare Bank, 379.
 Neanow v. Uttech, 114.
 Nebenzahl v. Townsend, 477.
 Neeb v. Hope, 325, 338.
 Needham v. King, 526.
 Neff v. Broom, 176.
 Neff v. Landis, 160, 376.
 Negaubauer v. Great Northern R. Co., 246.
 Negley v. Farrow, 325.
 Neldefer v. Chastain, 399.
 Neilon v. Kansas City, St. J. & C. B. R. Co., 182.
 Nelson v. Borchenius, 309, 312, 315.
 Nelson v. Burt, 373.
 Nelson v. Chesapeake & O. R. Co., 247, 249.
 Nelson v. Crawford, 84.
 Nelson v. Danielson, 479.
 Nelson v. Galveston, H. & S. A. R. Co., 133.
 Nelson v. Harrington, 16, 527.
 Nelson v. Iverson, 377.
 Nelson v. Milligan, 575.
 Nelson v. Nugent, 232.
 Nelson v. West Duluth, 367.
 Netherland-American Steam Nav. Co. v. Hollander, 468.
 Nettleton v. Sikes, 361.
 Neudecker v. Kohlberg, 31.
 Neumann v. Hudson County Consumers' Brewing Co., 550.
 Neville v. Gile, 465.
 Nevin v. Pullman Palace Car Co., 15, 41.
 Newark & S. O. H. C. R. Co. v. Hunt, 110.
 Newbold v. Brown, 392.
 New Brunswick Steamboat & Canal Transp. Co. v. Tiers, 529.
 Newcomb v. Boston Protective Department, 113, 205.
 Newell v. Randall, 403.
 New England Awl & Needle Co. v. Marlborough Awl & Needle Co., 440.
 New England Foundation Co. v. Reed, 581.
 New Jersey Midland R. Co. v. Van Syckle, 354.
 New Jersey Traction Co. v. Gardner, 525.
 New Jersey & N. Y. R. Co. v. Young, 194.
 Newkirk v. Sabler, 107.

[The figures refer to pages]

- | | |
|---|--|
| <p>Newman v. Davis, 481.
 Newman v. Fowler, 232, 236.
 Newman v. Phillipsburg Horse Car R. Co., 554.
 New Orleans, J. & G. N. R. Co. v. Harrison, 176.
 New Orleans & N. E. R. Co. v. Jopes, 259.
 Newsom v. Anderson, 347.
 Newton v. Brook, 13.
 Newton v. Porter, 8.
 Newton v. Weaver, 484, 486.
 Newton Co. v. Erickson, 583.
 New Windsor v. Stockdale, 354.
 New York Bank Note Co. v. Hamilton Bank Note Engraving & Printing Co., 450.
 New York Cent. & H. R. R. Co. v. Fraloff, 530.
 New York Cent. & H. R. R. Co. v. Maidment, 533.
 New York Cent. & H. R. R. Co. v. Reeves, 454.
 New York Cent. & H. R. R. Co. v. Well, 529.
 New York City Baptist Mission Soc. v. Potter, 270.
 New York Guaranty & Indemnity Co. v. Gleason, 28.
 New York, L. E. & W. R. Co. v. Haring, 208.
 New York, L. E. & W. R. Co. v. New Jersey Electric R. Co., 369, 383, 551.
 New York, L. E. & W. R. Co. v. Steinbrenner, 551.
 New York, P. & N. R. Co. v. Waldron, 274.
 New York Transp. Co. v. O'Donnell, 550.
 New York & N. H. R. Co. v. Schuyler, 208.
 New York & N. J. Tel. Co. v. Spelcher, 511.
 Nichols v. Brabazon, 261.
 Nichols v. Eaton, 334.</p> | <p>Nichols v. Marsland, 513.
 Nichols v. Pinner, 18, 397.
 Nichols v. Pittsfield Tp., 99.
 Nicholson v. Dillard, 311.
 Nickerson v. Thacher, 354.
 Nicolls v. Ingersoll, 285.
 Nierenberg v. Wood, 232.
 Niles v. Howe, 240.
 Nims v. Mt. Hermon Boys' School, 208.
 Nitro-Glycerine Case, 92.
 Nix v. Caldwell, 336.
 Nix v. Goodhill, 494, 495.
 Nixon v. Bolling, 575.
 Nixon v. Dispatch Printing Co., 329.
 Noack v. Wosslick, 510.
 Noeninger v. Vogt, 309.
 Nokes v. Mueller, 441.
 Nolan v. Jones, 160.
 Nolan v. New Britain, 558, 561.
 Nolin v. Pearson, 465, 466.
 Nolte v. Reichelm, 401.
 Noonan v. Pardee, 516.
 Norden v. Jones, 27.
 Nordhaus v. Vandalia R. Co., 232, 236.
 Norfolk & W. R. Co. v. Burge, 533.
 Norfolk & W. R. Co. v. Dougherty, 134.
 Norfolk & W. R. Co. v. Graham, 184.
 Norfolk & W. R. Co. v. Grose-close's Adm'r, 553.
 Norfolk & W. R. Co. v. Irvine, 34.
 Norfolk & W. R. Co. v. Poole's Adm'r, 100.
 Norfolk & W. R. Co. v. Wilson, 532.
 Norman v. Bell, 374.
 Norman v. Middlesex & S. Traction Co., 189.
 Norman v. Rogers, 385.
 Norrell v. Vogel, 487.
 Norris v. Casel, 259.</p> |
|---|--|

[The figures refer to pages]

- Norris v. Corkill, 168.
 Norris v. Hugh Nawn Contracting Co., 508.
 Norris v. McFadden, 403.
 North Alabama Traction Co. v. Thomas, 552.
 North Chicago St. R. Co. v. Ackley, 136.
 North Chicago St. R. Co. v. Dudgeon, 220.
 Northern Indiana R. Co. v. Michigan Cent. R. Co., 241.
 Northern Pac. R. Co. v. Babcock, 249.
 Northern Pac. R. Co. v. Hambly, 190, 191, 193.
 Northern Pac. R. Co. v. Herbert, 181, 189.
 Northern Pac. R. Co. v. Nickels, 184.
 Northern Pac. R. Co. v. Whalen, 560.
 Northern Transp. Co. v. Chicago, 577.
 North Haverill Water Co. v. Metcalf, 29.
 North Point Consolidated Irrigation Co. v. Utah & S. L. Canal Co., 578.
 North Star, The, 542.
 Norton v. Eastern R. Co., 35.
 Norton v. Ladd, 307.
 Norton v. North Carolina R. Co., 505.
 Norton v. Sewall, 93, 518.
 Norvell v. Gray's Lessee, 346.
 Norwalk Gaslight Co. v. Norwalk, 216, 221, 225.
 Nounnan v. Sutter County Land Co., 399.
 Nowak v. Waller, 280.
 Noyes v. Boscawen, 552.
 Noyes v. Colby, 58.
 Noyes v. Hall, 313.
 Noyes v. Loring, 29.
 Noyes v. Rutland & B. R. Co., 208.
 Nugent v. Brooklyn Heights R. Co., 133.
 Nye v. Merriam, 418.
 Nysewander v. Lowman, 417.
- O**
- Oakes v. Spaulding, 233.
 Oakes v. State, 325.
 Oakley v. Farrington, 312.
 Oakman v. Belden, 459, 463.
 Oberlin v. Upson, 287.
 O'Brien v. Capwell, 502.
 O'Brien v. Central Iron & Steel Co., 561.
 O'Brien v. Chicago, M. & St. P. R. Co., 126.
 O'Brien v. Cunard S. S. Co., 206.
 O'Brien v. Loomis, 499, 500.
 O'Brien v. Philadelphia, 471.
 O'Brien v. Times Pub. Co., 314.
 O'Callaghan v. Cronan, 583.
 Oceanic Steam Nav. Co. v. Compania Transatlantica Espanola, 238.
 Och v. Missouri, K. & T. R. Co., 126.
 Ochs v. Public Service R. Co., 74.
 O'Connell v. St. Louis Cable & W. R. Co., 531.
 O'Connor v. Bucklin, 284.
 O'Connor v. Sill, 332.
 Odger v. Mortimer, 324.
 O'Donnell v. McIntyre, 262.
 O'Driscoll v. Faxon, 175.
 Ogborn v. Francis, 470.
 Ogden v. Claycomb, 259.
 Ogden v. Riley, 307.
 Ogg v. Lansing, 201.
 Ohio & M. R. Co. v. Kasson, 8.
 Ohio & M. R. Co. v. Ramey, 513.
 Ohnmacht v. Mt. Morris Electric Light Co., 38.
 Olds v. Chicago Open Board of Trade, 378.
 Oliver v. Perkins, 19.
 Oliver v. State, 263.

[The figures refer to pages]

- | | |
|--|---|
| <p>Olmstead v. Partridge, 486.
 Olney v. Boston & M. R. R., 188.
 Omaha & R. V. R. Co. v. Brady, 498.
 O'Maley v. South Boston Gaslight Co., 187.
 O'Malley v. St. Paul, M. & M. R. Co., 506.
 O'Neil v. McKeesport, 359.
 O'Neil v. Toomey, 537.
 O'Neill v. Conway, 399.
 O'Neill v. New York, O. & W. R. Co., 96.
 Ophir Silver Mining Co. v. Superior Court of City & County of San Francisco, 241, 242.
 Oppermann v. Waterman, 440.
 O'Reilly v. New York & N. E. R. Co., 246, 249.
 O'Reilly de Camara v. Brooke, 108.
 Ormsby v. Douglass, 334, 335.
 Orser v. Storms, 355.
 Osborn v. Atchison, T. & S. F. R. Co., 506.
 Osborn v. First Nat. Bank, 31.
 Osborn v. Leach, 343.
 Osborn v. Veitch, 254.
 Osborne v. Morgan, 22, 171, 174.
 O'Shea v. Kirker, 237.
 O'Shields v. Georgia Pac. R. Co., 245.
 Osterheld v. Star Co., 342.
 Ostrom v. Calkins, 308.
 Otis Steel Co. v. Wingle, 189.
 Ott v. Murphy, 324.
 Outcalt v. Durling, 356.
 Outcault v. New York Herald Co., 301, 323.
 Outlaw v. Davis, 281.
 Overstreet v. Moser, 214.
 Oviatt v. Pond, 367.
 Owen v. Ogilvie Pub. Co., 298.
 Owsley v. Montgomery & W. P. R. Co., 207.
 Oystead v. Shed, 282.</p> | <p>Ozanne v. Illinois Cent. R. Co., 531.
 <p style="text-align: center;">P</p> Pace v. Potter, 348.
 Pack v. New York, 223.
 Paddock v. Salisbury, 341.
 Paddock v. Somes, 575.
 Paddock v. Strobridge, 403.
 Padmore v. Lawrence, 332.
 Padmore v. Piltz, 272.
 Paducah Traction Co. v. Baker, 537.
 Page v. Bent, 415.
 Page v. Citizens' Banking Co., 477, 490.
 Page v. Cushing, 495.
 Page v. De Puy, 358.
 Page v. Merwin, 313.
 Painter v. Baker, 46.
 Painter v. Ives, 482.
 Painton v. Northern Cent. R. Co., 180.
 Palm v. Ivorson, 526.
 Palmer v. Broder, 116.
 Palmer v. Concord, 296.
 Palmer v. Davidson, 368.
 Palmer v. Jarman, 378.
 Palmer v. Mahin, 344.
 Palmer v. Maine Cent. R. Co., 283.
 Palmer v. Matthews, 343.
 Palmer v. President, etc., of Delaware & H. Canal Co., 531.
 Palmer v. Smith, 259.
 Palmer v. Manhattan R. Co., 211.
 Panama R. Co. v. Napier Shipping Co., 248.
 Panton v. Williams, 483.
 Pantzar v. Tilly Foster Iron Mining Co., 192.
 Paolino v. McKendall, 507.
 Papke v. G. H. Hammond Co., 123.
 Pardoe v. Pardoe, 390.
 Parent v. Nashua Mfg. Co., 176.
 Paris v. Levy, 323.</p> |
|--|---|

[The figures refer to pages]

- Park v. O'Brien, 555.
 Parker v. Barlow, 361.
 Parker v. Bidwell, 285.
 Parker v. Foote, 48, 68.
 Parker v. Godin, 377.
 Parker v. Griswold, 71, 72.
 Parker v. Huntington, 492, 580.
 Parker v. Langley, 489.
 Parker v. Latner, 114.
 Parker v. Meek, 471.
 Parker v. Mise, 352.
 Parker v. Parker, 489.
 Parkhurst v. Masteller, 484.
 Parkinson v. Parker, 151.
 Parkinson Co. v. Building Trades Council, 429.
 Parks v. Northwestern University, 204, 205.
 Parlement Belge, The, 198.
 Parli v. Reed, 481.
 Parrott v. Barney, 392.
 Parrott v. Chicago Great Western R. Co., 222.
 Parsons v. Manser, 521.
 Parsons v. Surgey, 337.
 Pasley v. Freeman, 405.
 Passaic Print Works v. Ely & Walker Dry Goods Co., 439.
 Pastene v. Adams, 98.
 Pastorello v. Stone, 511.
 Pater v. Baker, 421.
 Patnode v. Westenhaver, 584.
 Patrick v. Springs, 528.
 Patten v. Gurney, 230.
 Patterson v. North Carolina Lumber Co., 177.
 Patterson v. Nutter, 271.
 Patterson v. Thompson, 469.
 Patterson v. Wilkinson, 313.
 Patterson v. Wright, 397.
 Pattison v. Jones, 334.
 Patton v. Cruce, 332.
 Patton v. Railway Co., 504.
 Patzack v. Von Gerichten, 147.
 Pauckner v. Wakem, 362, 510.
 Paul v. Fargo, 479.
 Paul v. Frazier, 116, 287.
 Paul v. Hummel, 158.
 Pauley v. Steam Gauge & Lantern Co., 32.
 Paull v. Halferty, 420.
 Pavesich v. New England Life Ins. Co., 289.
 Pavlovski v. Thornton, 134.
 Pawson v. Miller, 372.
 Payne v. Elliot, 372.
 Payne v. Western & A. R. Co., 437.
 Payne's Appeal, 119.
 Payson v. Macomber, 275.
 Peake v. Buell, 511.
 Pearce v. Aldrich Mining Co., 382.
 Pearson v. Inlow, 61.
 Pease v. Shippen, 342.
 Pease v. Smith, 377.
 Peck v. Chouteau, 485.
 Peck v. Hutchinson, 17, 527.
 Pedelty v. Wisconsin Zinc Co., 366.
 Pedrick v. Raleigh & P. S. R. Co., 561.
 Peek v. Gurney, 402, 404.
 Peeples v. Brown, 352.
 Peerless Pattern Co. v. Pictorial Review Co., 440.
 Pelky v. Palmer, 527.
 Pelton v. Nichols, 24.
 Pemberton v. Colls, 312.
 Pendleton v. Hawkins, 334.
 Pennsylvania Co. v. Marion, 525, 532.
 Pennsylvania Co. v. Ohio River Junction R. Co., 359.
 Pennsylvania Co. v. Roy, 531.
 Pennsylvania Co. v. Sinclair, 500.
 Pennsylvania Lead Co.'s Appeal, 557.
 Pennsylvania R. Co. v. Angel, 576.
 Pennsylvania R. Co. v. Beale, 533.
 Pennsylvania R. Co. v. Coon, 499.
 Pennsylvania R. Co. v. Kelley, 558.
 Pennsylvania R. Co. v. Kerr, 96.

[The figures refer to pages]

- Pennsylvania R. Co. v. Righter, 541.
 Pennsylvania R. Co. v. Snyder, 90.
 Penny v. State, 254.
 People v. Bank of North America, 372.
 People v. Bartels, 151.
 People v. Bartz, 283.
 People v. Batting, 5.
 People v. Carter, 5.
 People v. Colby, 151.
 People v. Constantino, 261.
 People v. Croswell, 320.
 People v. Detroit White Lead Works, 567, 579.
 People v. Fish, 5.
 People v. Fisher, 428.
 People v. Flack, 582.
 People v. Fuller, 320.
 People v. Garretson, 261.
 People v. Gilbert, 127.
 People v. Gold Run Ditch & Mining Co., 578.
 People v. Gordon, 110.
 People v. Green, 271.
 People v. Hamilton, 582.
 People v. Johnson, 582.
 People v. Lilley, 256.
 People v. Linck, 37.
 People v. Marcus, 429.
 People v. Melvin, 428.
 People v. Morehouse, 254.
 People v. O'Brien, 402.
 People v. Rodrigo, 261.
 People v. Rounds, 283.
 People v. Severance, 572.
 People v. Warren, 156, 278.
 People v. Watson, 582.
 People v. Wheeler, 274.
 People v. Yslas, 254.
 People ex rel. Burnham v. Flynn, 361.
 People's Nat. Bank of Boston v. Dixwell, 414.
 Percival v. Jones, 281.
 Perez v. Rabaud, 569.
 Perkins v. New York Cent. R. Co., 524.
 Perkins v. Pendleton, 449.
 Perkins v. Smith, 377.
 Perkins v. Spaulding, 485.
 Perley v. Eastern R. Co., 96.
 Perpich v. Leetonia Mining Co., 550.
 Perry v. Carr, 389, 392.
 Perry v. House of Refuge, 204.
 Perry v. Jefferies, 61, 369.
 Perry v. People's Gas Light & Coke Co., 558.
 Peschel v. Chicago, M. & St. P. R. Co., 193.
 Peters v. Bowman, 507.
 Peters v. Johnson, 20.
 Peters v. Johnson, Jackson & Co., 518.
 Peters v. Land, 142.
 Peters v. Peters, 135.
 Peterson v. American Grass Twine Co., 183.
 Peterson v. Haffner, 158, 258.
 Peterson v. Western Union Tel. Co., 293, 298, 300.
 Petrie v. J. Henry Small Realty Co., 178.
 Petsch v. Dispatch Printing Co., 304.
 Pettingill v. Rideout, 7.
 Petts v. Ison, 119.
 Petur v. Erie R. Co., 504.
 Pfister v. Milwaukee Free Press Co., 322, 343.
 Pfitzinger v. Dubs, 314.
 Phair v. Dumond, 133.
 Phelin v. Kenderdine, 82.
 Phelon v. Stiles, 213.
 Phelps v. Nowlen, 65.
 Phelps v. Wait, 233.
 Philadelphia, B. & W. R. Co. v. Allen, 531.
 Philadelphia, B. & W. R. Co. v. Hand, 555.

[The figures refer to pages]

- Philadelphia, W. & B. R. Co. v. Philadelphia H. De G. Steam Towboat Co., 43.
 Philadelphia, W. & B. R. Co. v. Quigley, 334, 337.
 Philadelphia, W. & B. R. Co. v. State, 189.
 Philadelphia & R. R. Co. v. Smith, 569, 570.
 Phillips v. Barnet, 134.
 Phillips v. Bowers, 374.
 Phillips v. Eyre, 248, 250, 251.
 Phillips v. Hoefer, 309.
 Phillips v. Hollister, 411.
 Phillips v. Hoyle, 82.
 Phillips v. Lawrence Vitrified Brick & Tile Co., 565.
 Phillips v. Trull, 283.
 Philp v. Squire, 458.
 Philpot v. Lucas, 485.
 Philpott v. Kirkpatrick, 463.
 Picard v. McCormick, 401.
 Pickands, The H. S., 44.
 Pickard v. Collins, 568.
 Pickering v. Dowson, 402.
 Pickering v. Rudd, 349.
 Pickett v. Walsh, 430, 431, 447.
 Pickett v. Wilmington & W. R. Co., 504, 544.
 Pierce v. Dart, 571.
 Pierce v. German Savings & Loan Soc., 568.
 Pierce v. New Bedford, 200.
 Pierce v. Rodliff, 319.
 Pierce v. Stablemen's Union, 442.
 Pierce v. Thompson, 488.
 Pierce v. Whitcomb, 511.
 Pike v. Carter, 148.
 Pike v. Hanson, 275.
 Pike v. Honsinger, 527.
 Pike v. Megoun, 151.
 Pike (Lord) v. Heneage, 378.
 Pilkinton v. Gulf, C. & S. F. R. Co., 183.
 Piller v. Southern Pac. R. Co., 131.
 Pillsbury v. Moore, 569.
 Pinney v. Winsted, 365.
 Piper v. Hoard, 49.
 Piper v. Pearson, 147.
 Pitt v. Dacre, 246.
 Pitt v. Donovan, 423.
 Pittock v. O'Neill, 329, 345.
 Pittsburg, C., C. & St. L. R. Co. v. Volkert, 498.
 Pittsburgh, C. & St. L. R. Co. v. Lyon, 25.
 Pittsburg, Ft. W. & C. R. Co. v. Devinney, 183.
 Pittsburg, Ft. W. & C. R. Co. v. Powers, 184.
 Pittsburgh, J. E. & E. R. Co. v. Wakefield Hardware Co., 495.
 Pittsburg Life & Trust Co. v. Northern Cent. Life Ins. Co., 412.
 Place v. Minster, 584.
 Plant v. Woods, 432.
 Platt & Speith v. Chicago, B. & Q. R. Co., 561.
 Platz v. Cohoes, 114.
 Ploof v. Burlington Traction Co., 553.
 Ploof v. Putnam, 107.
 Plourd v. Jarvis, 457.
 Plumer v. Harper, 567.
 Plumley v. Birge, 548.
 Plummer v. Dill, 508.
 Plymouth, The, 44.
 Poeppers v. Missouri, K. & T. R. Co., 80.
 Poincy v. Burke, 360.
 Poindexter v. May, 348.
 Poland v. Earhart, 526.
 Polaria, The, 213.
 Polhill v. Walter, 411.
 Pollard v. Lyon, 306, 317, 319.
 Pollasky v. Minchener, 335.
 Pollett v. Long, 100.
 Pollock v. Pollock, 466.
 Pomerene Co. v. White, 525.
 Pomeroy v. Benton, 409.
 Pond v. People, 263.
 Ponsford v. Financial Times, 331.

[The figures refer to pages]

- Pooler v. U. S., 136.
 Pooley v. Dutton, 459.
 Popham v. Pickburn, 330.
 Porter v. Mack & Boren, 482, 581.
 Porter v. Thomas, 170.
 Porter v. United Rys. Co. of St. Louis, 408.
 Portuondo Cigar Mfg. Co. v. Vicente Portuondo Cigar Mfg. Co., 440.
 Post v. Munn, 352.
 Postal v. Cohn, 31.
 Postal Telegraph Cable Co. v. Terrill, 86.
 Potosi Zinc Co. v. Mahoney, 420.
 Potter v. Casterline, 489.
 Potter v. Gilbert, 172.
 Potter v. Necedah Lumber Co., 418.
 Powell v. Benthall, 458.
 Powell v. Bentley & Gerwig Furniture Co., 573.
 Powell v. F. C. Linde Co., 406, 415.
 Powell v. Fletcher, 401.
 Powell v. Great Northern R. Co., 245, 249.
 Powell v. Strickland, 459.
 Powell v. Virginia Const. Co., 215.
 Powers v. Clarkson, 354.
 Powers v. Massachusetts Homeopathic Hospital, 204, 206.
 Powers v. Skinner, 321.
 Powers v. Sumblor, 466.
 Pratt v. Gardner, 143.
 Preiser v. Wielandt, 255.
 Prentiss v. Russ, 403.
 Prescott v. Norris, 160.
 Prescott v. Ottman Lithographing Co., 181.
 Presnell v. Moore, 165.
 Press Co. v. Stewart, 319, 323.
 Pressley v. Mobile & G. R. Co., 213.
 Prest-O-Lite Co. v. Skeel, 538.
 Preston v. Chicago & W. M. R. Co., 182.
 Preston v. Cooper, 479.
 Preston v. Preston, 359.
 Prettyman v. Williamson, 460.
 Price v. Crofts, 492.
 Price v. Ga Nun, 527.
 Price v. Grantz, 75, 563.
 Price v. Price, 231, 465.
 Price v. Seeley, 283.
 Price v. Whitely, 315.
 Priestly v. Fowler, 189.
 Prince v. Ridge, 254, 255.
 Prince Mfg. Co. v. Prince's Metallic Paint Co., 112.
 Printup v. Smith, 130.
 Proctor v. Adams, 107.
 Proctor v. Southern R. Co., 499.
 Proffitt v. Henderson, 390.
 Prosser v. Callis, 314.
 Prosser v. West Jersey & S. R. Co., 501.
 Pruey v. New York Cent. & H. R. Co., 533.
 Pullan v. Stallman, 516.
 Pullen v. Glidden, 489.
 Pullman v. Walter Hill & Co., 298, 338.
 Pullman Palace Car Co. v. Bluhm, 103.
 Pullman Palace Car Co. v. Laack, 79.
 Pullman Palace Car Co. v. Lawrence, 241, 244, 248.
 Pulver v. Harris, 137.
 Pumpelly v. Green Bay & M. Canal Co., 577.
 Pundman v. St. Charles County, 203.
 Puerto v. Chieppa, 71.
 Purcell v. Daly, 360.
 Purcell v. Richmond & D. R. Co., 15.
 Purcell v. Sowler, 330.
 Purington v. Hinchliff, 431, 443.
 Purl v. St. Louis, K. C. & N. R. Co., 548.
 Purves v. Landell, 527.

[The figures refer to pages]

- Purvis v. United Brotherhood of Carpenters and Joiners, 443.**
Putnam v. Broadway & S. A. R. Co., 272.
Putnam v. Ritchie, 366.
Putnam v. Wyley, 355, 356.
Putney v. Hardy, 410.
Pynchon v. Stearns, 391.
- Q**
- Quantz v. Southern R. Co., 511.**
Quartz Hill Consol. Gold Mining Co. v. Eyre, 480, 492.
Quebec S. S. Co. v. Merchant, 193.
Quigley v. Levering, 181.
Quigley v. Thompson, 211.
Quill v. New York, 201.
Quilty v. Battle, 168.
Quinby v. Minnesota Tribune Co., 344.
Quincy v. Jones, 516.
Quinlan v. Welch, 33.
Quinn v. Heisel, 283.
Quinn v. Leathem, 430, 443, 450, 453.
Quinn v. Ross Motor Car Co., 548.
Quist v. Kitchli, 300.
- R**
- Rabb v. Patterson, 119.**
Rachelman v. Skinner, 491.
Rader v. Davis, 65.
Radley v. London & N. R. Co., 544.
Radway v. Duffy, 243, 373.
R. A. Elder & Co. v. Shoffstall, 417.
Rafael v. Verelest, 241.
Raffel v. Epworth, 406.
Rafferty v. Erie R. Co., 505.
Ragon v. Toledo, A. A. & N. M. R. Co., 187.
Rahmel v. Lehndorff, 214.
Railey v. Garbutt, 193.
Railroad v. Delaney, 318.
Railroad Co. v. Hanning, 222.
Railroad Co. v. Morey, 218.
Railway Co. v. Lewis, 252.
Raisor v. Chicago & A. R. Co., 246.
Ralli v. Troop, 210, 542.
Ramsey v. Cheek, 314, 335, 339, 340.
Ramsey v. Wallace, 399.
Ranch v. Lynch, 418.
Rand v. Sargent, 352.
Rand Lumber Co. v. Burlington, 577.
Randall v. Brigham, 145.
Randall v. Cleaveland, 369.
Randall v. Sanders, 353.
Randolph v. O'Riordon, 551.
Randolph's Adm'r v. Snyder, 11, 13.
Rapuzzi v. Stetson, 527.
Ratcliffe v. Walker, 463, 464, 582, 584.
Rathbun v. Emigh, 311.
Ratzel v. New York News Pub. Co., 332.
Ravenga v. Mackintosh, 487.
Rawson v. Leggett, 483.
Ray v. Parsons, 459.
Ray County Sav. Bank v. Hutton, 412.
Raycroft v. Tayntor, 449.
Raymond v. Burlington, C. R. & N. R. Co., 530.
Raymond v. Lowe, 29.
Raymond v. Yarrington, 448, 453.
Raymond Syndicate v. Guttentag, 381, 383.
Raymound v. Portland R. Co., 524, 525.
Raynsford v. Phelps, 152.
Razee v. State, 320.
Rea v. Sherward, 364.
Rea v. Tucker, 116.
Read v. Case, 285.
Read v. City & S. R. Co., 552.
Read v. Coker, 254.
Read v. Earle, 134.

[The figures refer to pages]

- | | |
|---|--|
| <p>Read v. East Providence Fire Dist., 224.</p> <p>Read v. Edwards, 347.</p> <p>Read v. Friendly Soc., etc., 447.</p> <p>Read v. Markle, 130.</p> <p>Read v. Nichols, 96.</p> <p>Read v. Spaulding, 81, 529.</p> <p>Reade v. Sweetzer, 323.</p> <p>Reading Finance & Securities Co. v. Harley, 373.</p> <p>Reams v. Pancoast, 115.</p> <p>Reardon v. Thompson, 511.</p> <p>Rearick v. Wilcox, 324.</p> <p>Reddie v. Scoolt, 116.</p> <p>Redgate v. Roush, 331, 337.</p> <p>Redway y. Gray, 306.</p> <p>Reed v. Belfast, 203.</p> <p>Reed v. Conway, 150.</p> <p>Reed v. Harper, 165.</p> <p>Reed v. New York & R. Gas Co., 358.</p> <p>Reed v. Peck, 230, 231.</p> <p>Reed v. Rich, 235.</p> <p>Reese v. Reese, 132.</p> <p>Reese River Silver Mining Co., In re, 411.</p> <p>Regan v. Luthy, 389.</p> <p>Regis v. Jaynes & Co., 42.</p> <p>Reld v. Humber, 171.</p> <p>Reld v. Providence Journal Co., 317.</p> <p>Reilly v. Curtiss, 295.</p> <p>Reilly v. Erie R. Co., 57.</p> <p>Reimer's Appeal, 349.</p> <p>Reinecke Coal Mining Co. v. Wood, 449.</p> <p>Reis v. Rohde, 360.</p> <p>Reisler v. Interborough R. T. Co., 284.</p> <p>Reizenstein v. Clark, 237.</p> <p>Reizenstein v. Marquardt, 130.</p> <p>Remer v. Long Island R. Co., 550.</p> <p>Remick v. Wentworth, 154.</p> <p>Repp v. Indianapolis C. & S. T. Co., 530.</p> <p>Ressler v. Peats, 278.</p> <p>Reuck v. McGregor, 284.</p> | <p>Rex v. Hunt, 284.</p> <p>Rex v. Papineau, 573.</p> <p>Rex v. Williams, 296.</p> <p>Rexter v. Starin, 541.</p> <p>Reynolds v. Bentley, 317.</p> <p>Reynolds v. Boston & M. R. Co., 185.</p> <p>Reynolds v. Holland, 322.</p> <p>Reynolds v. Hussey, 58, 522.</p> <p>Reynolds v. Phillips, 364.</p> <p>Reynolds v. Pierson, 64.</p> <p>Reynolds v. Shuler, 375.</p> <p>Reynolds v. Tucker, 342.</p> <p>Reynolds v. Van Beuren, 568.</p> <p>Rhoades v. Seidel, 502.</p> <p>Rhobidas v. Concord, 5.</p> <p>Rhodes v. Dickerson, 395, 406.</p> <p>Rhodes v. Naglee, 303.</p> <p>Rice v. Boyer, 160.</p> <p>Rice v. Coolidge, 49, 50, 236, 476.</p> <p>Rice v. King Philip Mills, 16.</p> <p>Rice v. Manley, 406, 455, 456.</p> <p>Rice v. Miller, 156.</p> <p>Rice v. Nickerson, 467, 472.</p> <p>Rice v. Norfolk Southern R. Co., 468.</p> <p>Rice v. Ponder, 490.</p> <p>Rice v. Yocum, 23, 170.</p> <p>Rich v. Johnson, 352.</p> <p>Rich v. New York Cent. & H. R. R. Co., 2, 18.</p> <p>Richards v. Daugherty, 562.</p> <p>Richards v. Jewett Bros. & Co., 489.</p> <p>Richardson v. Carbon Hill Coal Co., 205.</p> <p>Richardson v. Carr, 363.</p> <p>Richardson v. Dunn, 417.</p> <p>Richardson v. Gunby, 335.</p> <p>Richardson v. New York Cent. R. Co., 35.</p> <p>Richardson v. Rowland, 497.</p> <p>Richardson v. St. Louis & H. R. Co., 541.</p> <p>Richardson v. Trimble, 395.</p> <p>Richardson v. Vermont Central R. Co., 516.</p> |
|---|--|

[The figures refer to pages]

- Richmond v. Sitterding, 219.
 Richmond Traction Co. v. Martin's Adm'r, 544.
 Richmond & M. R. Co. v. Moore, 221.
 Rick v. Saginaw Bay Towing Co., 249.
 Ricker v. Freeman, 91.
 Rideout v. Knox, 49, 68.
 Rider v. Rulison, 315.
 Rider v. Syracuse Rapid Transit R. Co., 541.
 Rider v. White, 522.
 Riedeman v. Mt. Morris Electric Light Co., 566.
 Riggs v. Standard Oil Co., 22.
 Riley v. Bell, 409, 414.
 Riley v. Boston Water Power Co., 373.
 Riley v. Harris, 361, 522.
 Riley v. Simpson, 228.
 Rimmer v. Blasingame, 269.
 Rincicotti v. John J. O'Brien Contracting Co., 16, 180, 192.
 Rinehart v. Bills, 462, 463.
 Ring v. Cohoes, 99.
 Ring v. Ogden, 49.
 Rink v. Lowry, 510.
 Rippey v. State, 260.
 Risher v. Acken Coal Co., 574.
 Ritchie v. Arnold, 334.
 Ritchie v. Waller, 210, 212.
 Ritchie v. Widdemer, 309.
 Rix & Stafford v. Silkknitter, 352.
 Roanoke Ry. & Electric Co. v. Carroll, 545.
 Robb v. Mann, 354.
 Robbins v. Chicago, 218, 220.
 Robbins v. Mount, 159.
 Robbins v. Robbins, 490.
 Roberson v. Rochester Folding Box Co., 288, 289.
 Roberts v. Berdell, 130.
 Roberts v. Clark, 456.
 Roberts v. Colorado Springs & I. R. Co., 126.
 Roberts v. Connelly, 470.
 Roberts v. Dunsmuir, 241.
 Roberts v. Eldridge, 272.
 Roberts v. English Mfg. Co., 297.
 Roberts v. Evans, 27.
 Roberts v. Jacobs, 457.
 Roberts v. Johnson, 236.
 Roberts v. Knights, 248.
 Robertson v. Parker, 147, 148.
 Robertson v. Parks, 581.
 Robeshaw v. Smith, 335.
 Robinett v. McDonald, 294.
 Robinson v. Baugh, 566.
 Robinson v. Bird, 61, 377.
 Robinson v. Chamberlain, 152.
 Robinson v. Consolidated Gas Co., 539.
 Robinson v. Marino, 522.
 Robinson v. Musser, 287.
 Robinson v. Oceanic Steam Nav. Co., 247.
 Robinson v. Powers, 287.
 Robinson v. Vaughton, 230.
 Roblin v. Kansas City, St. J. & C. B. R. Co., 183.
 Rockport v. Rockport Granite Co., 229.
 Rockwell v. Nearing, 111, 363.
 Rocky Mountain Bell Tel. Co. v. Montana Federation of Labor, 442.
 Rocky Mountain Bell Tel. Co. v. Utah Independent Tel. Co., 440.
 Rodenhausen v. Craven, 565.
 Roemer v. Jacob Schmidt Brewing Co., 207.
 Roessler & Hasslacher Chemical Co. v. Doyle, 557, 562.
 Rogers v. Atlantic, G. & P. Co., 369.
 Rogers v. Clifton, 334.
 Rogers v. Cox, 361.
 Rogers v. Elliott, 75, 563.
 Rogers v. Evarts, 434, 435.
 Rogers v. Spokane, 120, 121.
 Rogers v. Weir, 381, 384.
 Rohlf v. Fairgrove Tp., 555.
 Rollins v. Chalmers, 472.

[The figures refer to pages]

- | | |
|--|---|
| <p>Rome Furnace Co. v. Patterson, 504.
 Rommel v. Schambacher, 17.
 Romney Marsh v. Trinity House, 79.
 Rooney v. Sewall & Day Cordage Co., 179, 187.
 Roscoe v. Bodin, 363.
 Rose v. Lewis, 372.
 Roseneau v. Empire Circuit Co., 66, 451.
 Rosenheimer v. Standard Gas Light Co., 559, 574.
 Rosenthal v. Chicago & A. R. Co., 549.
 Rosenthal v. Davenport, 152.
 Ross v. Butler, 566.
 Ross v. Johnson, 374.
 Ross v. Leggett, 284.
 Ross v. Mather, 23.
 Ross v. W. D. Cleveland & Sons, 406.
 Rossell v. Cottom, 347.
 Rossiter v. Minnesota Bradner-Smith Paper Co., 494.
 Roswell v. Prior, 228.
 Rothholz v. Dunkle, 334.
 Rothmiller v. Stein, 403, 405.
 Roughan v. Boston & Lockport Block Co., 180.
 Rounds v. Delaware, L. & W. R. Co., 212.
 Rowan v. Butler, 583.
 Rowe v. Rugg, 270, 271.
 Rowe v. Smith, 168.
 Royal Aquarium Soc. v. Parkinson, 339.
 Royce v. Carpenter, 575.
 Rudd v. Darling, 144.
 Rudolph v. Portland Ry., Light & Power Co., 535.
 Ruggles v. Lesure, 360.
 Ruhland v. Cole, 323.
 Rummey v. Worthley, 297.
 Runyan v. Central R. Co. of New Jersey, 15.
 Rush v. Buckley, 148.</p> | <p>Rush v. Cavanaugh, 308.
 Ruskin v. Armn, 322.
 Russell v. Anthony, 316.
 Russell v. Barron, 301.
 Russell v. Barrow, 364.
 Russell v. Chambers, 472.
 Russell v. Minneapolis & St. L. R. Co., 187.
 Russell v. New York, 38.
 Russen v. Lucas, 277.
 Russo v. Maresca, 235.
 Rust v. Low, 362.
 Rutherford v. Holmes, 147.
 Rutherford v. Paddock, 321.
 Rutland & W. R. Co. v. Bank of Middlebury, 386.
 Rutledge v. Missouri Pac. R. Co., 184.
 Ryalls v. Mechanics' Mills, 40.
 Ryan v. New York Cent. R. Co., 49, 94, 95.
 Ryan v. Towar, 507.
 Rychlicki v. St. Louis, 569.
 Ryckman v. Delavan, 295.
 Ryerson v. Bathgate, 511.
 Rylands v. Fletcher, 512, 513.</p> <p style="text-align: center;">S</p> <p>Sabine & E. T. R. Co. v. Johnson, 354.
 Sabre v. Mott, 266.
 Sacchetti v. Fehr, 322.
 Sachs v. Sioux City, 38.
 Sackheim v. Pigueron, 555.
 Sadgrove v. Hole, 298, 338.
 Sadowski v. Michigan Car Co., 192.
 Safety Insulated Wire & Cable Co. v. Baltimore, 202.
 Safford v. Grout, 407.
 St. Helen's Smelting Co. v. Tipping, 565, 566.
 St. James Military Academy v. Gaiser, 312.
 St. John v. Antrim Iron Co., 27, 29.</p> |
|--|---|

[The figures refer to pages]

- St. Louis, I. M. & S. R. Co. v. Taylor, 87.
 St. Louis, I. M. & S. R. Co. v. Wilson, 41.
 St. Louis Southwestern R. Co. v. Russell, 504.
 St. Louis & N. A. R. Co. v. Wilson, 15.
 St. Ores v. McGlashen, 165.
 St. Paul Water Co. v. Ware, 217, 221.
 Sales v. Western Stage Co., 530.
 Salisbury v. Erie R. Co., 229.
 Salisbury v. Herchenroder, 34.
 Salisbury v. Union & Advertiser Co., 330.
 Salmon v. Libby, McNeill & Libby, 518.
 Salter v. Howard, 446.
 Salt Springs Nat. Bank v. Wheeler, 380.
 Sammons v. Gloversville, 577.
 Sampson v. Grogan, 392.
 Sampson v. Hammond, 373.
 Sanborn v. Colman, 383.
 Sanborn v. Neilson, 461.
 Sandell v. Sherman, 486.
 Sanders v. Sanders, 360.
 Sanders v. Teape, 347.
 Sanderson v. Caldwell, 311.
 Sandford v. Nichols, 157.
 Sandys v. Florence, 528.
 Saner v. Lake Shore & M. S. R. Co., 553.
 Sanford v. Augusta, 133.
 Sanford v. Eighth Ave. R. Co., 272.
 Sanford v. Standard Oil Co., 189.
 Sapp v. Roberts, 359.
 Sargent v. Franklin Ins. Co., 387.
 Sargent v. Gile, 380.
 Sargent v. Mathewson, 467.
 Sargent v. Stark, 227.
 Sarjeant v. Blunt, 378.
 Sartwell v. Parker, 485.
 Sartwell v. Sowles, 157.
 Saucier v. New Hampshire Spinning Mills, 185.
 Saunders v. Edwards, 131.
 Saunders v. Mills, 330.
 Sauter v. New York Cent. & H. R. R. Co., 88, 540.
 Savacool v. Boughton, 155.
 Savannah, F. & W. R. Co. v. Beavers, 507.
 Saville v. Jardine, 316.
 Savill v. Roberts, 492, 582.
 Savings Bank v. Ward, 152.
 Sawyer v. Davis, 577.
 Sawyer v. McGillicuddy, 502.
 Saxton v. Barber, 463.
 Saylor v. Parsons, 91.
 Sayre v. Sayre, 341.
 Scarlett v. Norwood, 287, 470.
 Schaefer v. Osterbrink, 158.
 Schaffner v. Ehrman, 24.
 Scheffer v. Washington City, V. M. & G. S. R. Co., 87.
 Schenectady First Baptist Church v. Schenectady & T. R. Co., 207.
 Schick v. Fleischauer, 14.
 Schiffer v. W. N. Sauer Co., 508.
 Schille v. Brokhahus, 366.
 Schillinger v. U. S., 197.
 Schindel v. Schindel, 367.
 Schip v. Pabst Brewing Co., 225.
 Schlang v. Ladies' Waist Makers' Union, 456.
 Schlitz Brewing Co. v. Shiel, 568.
 Schloendorff v. Society of New York Hospital, 206.
 Schmidt v. Cook, 569.
 Schmidt v. Menasha Woodenware Co., 38.
 Schmidt v. Mitchell, 88.
 Schneider v. Heath, 402.
 Schneider v. Local Union, No. 60, 449.
 Schneider v. Schneider, 400.
 Schneider v. State, 258.
 Schnur v. Citizens' Traction Co., 547.

[The figures refer to pages]

- Schoepflin v. Coffey, 299.
 Schofield v. Ferrers, 489.
 Scholfield Gear & Pulley Co. v. Scholfield, 398.
 Schomberg v. Walker, 325.
 Schomp v. Schenck, 497.
 School District v. Neil, 561.
 School Dist. No. 1 v. Bragdon, 158.
 Schroepfel v. Corning, 130.
 Schryer v. Fenton, 385.
 Schubach v. McDonald, 454.
 Schubert v. J. R. Clark Co., 93.
 Schug v. Chicago, M. & St. P. R. Co., 504.
 Schuler v. Henry, 168.
 Schulman v. Whitaker, 291.
 Schultz v. Chicago & N. W. R. Co., 187.
 Schultz v. Frankfort Marine, Accident & Plate Glass Ins. Co., 581.
 Schultz v. Greenwood Cemetery, 485.
 Schultz v. Milwaukee, 200.
 Schultz v. Schultz, 134.
 Schumaker v. Mather, 409.
 Schumaker v. St. Paul & D. R. Co., 103.
 Schumann v. Torbett, 479.
 Schuyler v. Curtis, 288, 291.
 Schwabacker v. Riddle, 227.
 Scofield v. Kreiser, 377.
 Scofield Rolling Mill Co. v. State, 207.
 Scott v. Eldridge, 284.
 Scott v. Haddock, 129.
 Scott v. Hunter, 77, 103.
 Scott v. London & St. Katherine Docks Co., 537.
 Scott v. McKinnish, 341.
 Scott v. O'Brien, 463.
 Scott v. Rogers, 379.
 Scott v. Seymour, 251.
 Scott v. Shelor, 488, 489.
 Scott v. Shepherd, 46, 91.
 Scott v. Stansfield, 327.
 Scott v. Watson, 157, 158.
 Scovill v. Glasner, 487.
 Scribner v. Beach, 262.
 Scribner v. Kelley, 523.
 Seaboard Mfg. Co. v. Woodson, 180.
 Seabrook v. Mostowitz, 360.
 Seaman v. Cuppledick, 262.
 Seaman v. Netherclift, 327.
 Searing v. Saratoga Springs, 115.
 Searles v. Crombie, 356.
 Searles v. Cronk, 72.
 Searles v. Viets, 275.
 Sears v. Hicklin, 394.
 Seattle Electric Co. v. Hoyden, 548.
 Seavey v. Preble, 106.
 Second Congregational Soc. in North Bridgewater v. Waring, 135.
 Secor v. Babcock, 489.
 Secor v. Harris, 308, 309.
 Secretary of State v. Kamachee Bore Sahaba, 108.
 Sedgwick v. Stanton, 497.
 Seekins v. Goodale, 152.
 Seely v. Alden, 367.
 Selfert v. Dillon, 558.
 Selfter v. Brooklyn Heights R. Co., 101.
 Seip v. Deshler, 316.
 Selther v. Philadelphia Traction Co., 124.
 Selleck v. Janesville, 540.
 Selma, R. & D. Co. v. Lacy, 250.
 Semayne's Case, 153.
 Seneca Road Co. v. Auburn & R. Co., 73.
 Settle v. St. Louis & S. F. R. Co., 188.
 Severance v. Judkins, 485.
 Severns v. Brainard, 488.
 Sewall v. Catlin, 309.
 Seward v. Heflin, 383.
 Seymer v. Lake, 554.
 Seymour v. Butterworth, 323, 324.
 Shackett v. Bickford, 411.

[The figures refer to pages]

- Shafer v. Ahalt, 306, 313.
 Shaffer v. Union Brick Co., 233.
 Shafford v. Brown, 139.
 Shanley v. Wells, 284.
 Shannon v. Swanson, 460.
 Shattuck v. Allen, 345.
 Shaubut v. St. Paul & S. O. R. Co., 561.
 Shaul v. Brown, 481, 483.
 Shaver v. White, 241.
 Shaw v. Chicago, R. I. & P. R. Co., 122.
 Shaw v. Coffin, 158.
 Shaw v. Delaware, L. & W. R. Co., 126.
 Shaw v. Georgia R. R., 505.
 Shaw v. Kaler, 382.
 Shea v. Gurney, 176.
 Shea v. McEvoy, 502.
 Shea v. Milford, 372.
 Shearer v. Evans, 377.
 Sheehan v. Boston, 111.
 Sheehan v. St. Paul & D. R. Co., 504.
 Sheehan v. Sturges, 271.
 Sheffill v. Van Deusen, 297.
 Sheftall v. Central of Georgia R. Co., 337.
 Shelby v. Sun Printing & Publishing Ass'n, 294, 316.
 Sheldon v. Southern Exp. Co., 369.
 Shelfer v. Gooding, 327.
 Shell v. Roseman, 399.
 Shellabarger v. Morris, 350.
 Shepherd v. Baer, 332.
 Shepherd v. Piper, 306.
 Sherman v. Braman, 357, 358.
 Sherman Line Co. v. Glens Falls, 360.
 Sherry v. Perkins, 435, 583.
 Sherwood v. Titman, 460.
 Shilling v. Carson, 342.
 Shine v. Fox Bros. Mfg. Co., 443.
 Shinglemeyer v. Wright, 299.
 Shipley v. Fifty Associates, 514.
 Shipley v. Ritter, 359.
 Shippy v. Au Sable, 200.
 Shirely v. Cedar Rapids, I. F. & N. W. R. Co., 574.
 Shockey v. McCauley, 344.
 Shuffler v. Turner, 130.
 Shurtleff v. Parker, 336.
 Shurtleff v. Stevens, 331, 333.
 Sibila v. Bahney, 33.
 Sieber v. Amunson, 122.
 Sieber v. Pettit, 459.
 Sieling v. Clark, 402.
 Sikes v. Johnson, 158.
 Silva v. Hawn, 578.
 Simmons v. Everson, 57, 232, 558, 562.
 Simmons v. Lillystone, 372.
 Simmons v. More, 414.
 Simmons v. Morse, 314.
 Simmons v. Norton, 391.
 Simmons v. Sikes, 378.
 Simons v. Casco Tp., 99.
 Simons v. Cissna, 416.
 Simpson v. Grayson, 469, 471.
 Simpson v. Hill, 273, 276.
 Simpson v. Press Pub. Co., 314.
 Simpson v. State, 264.
 Sims v. American Steel Barge Co., 193.
 Sims v. Harrison, 360.
 Sims v. Sims, 465.
 Singer v. Bender, 308.
 Singer Mfg. Co. v. King, 380.
 Singer Mfg. Co. v. Rahn, 222.
 Singleton's Adm'r v. Kennedy, 418.
 Siordet v. Hall, 80.
 Sioux City & P. R. Co. v. Stout, 506.
 Sipe v. Pennsylvania R. Co., 224.
 Six Carpenter's Case, 356.
 Skelton v. Larkin, 216.
 Skidmore v. Bricker, 485.
 Skinner v. Gunton, 492, 582.
 Slater v. Jewett, 175.
 Slater v. Mersereau, 98, 232.
 Slater v. Mexican Nat. R. Co., 244, 245.

[The figures refer to pages]

- Slater v. South Carolina R. Co., 529.
 Slater v. Swan, 352.
 Slattery v. New York, N. H. & H. R. Co., 553.
 Slaughter v. Gerson, 406, 408.
 Slayton v. Barry, 159, 160.
 Sleeper v. Baker, 452, 453.
 Slight v. Gutzlaff, 569.
 Sloan v. Central Iowa R. Co., 176.
 Sloan v. Pierce, 262.
 Slobodin v. Sun Printing & Publishing Ass'n, 304.
 Small v. Howard, 527.
 Small v. Robinson, 27.
 Smedis v. Brooklyn & R. B. R. Co., 533.
 Smid v. Bernard, 318.
 Smith v. Ashley, 299.
 Smith v. Bolles, 417.
 Smith v. Bouchier, 147.
 Smith v. Bull, 241.
 Smith v. Burrus, 479.
 Smith v. City Council of Rome, 389.
 Smith v. Cranford, 121.
 Smith v. Davenport, 158.
 Smith v. Drew, 39.
 Smith v. Elliott, 567.
 Smith v. Foran, 238.
 Smith v. Higgins, 333.
 Smith v. Hilton, 157.
 Smith v. Hobson, 308.
 Smith v. Hockenberry, 460.
 Smith v. Holmes, 152.
 Smith v. Hyndman, 496.
 Smith v. Jackson, 511.
 Smith v. Johnson, 66.
 Smith v. Kansas City, 367.
 Smith v. King, 484.
 Smith v. Kingman & Co., 402.
 Smith v. Lockwood, 8.
 Smith v. London & S. W. R. Co., 79, 96.
 Smith v. Marion Fruit Jar & Bottle Co., 506.
 Smith v. Mattingly, 389.
 Smith v. Meyers, 460, 461.
 Smith v. Michigan Buggy Co., 479.
 Smith v. Miller, 367.
 Smith v. Milwaukee Builders' & Traders' Exchange, 220, 223.
 Smith v. Munch, 483.
 Smith v. New York S. & W. R. Co., 89.
 Smith v. New York & H. R. Co., 189.
 Smith v. Norfolk & S. R. Co., 545, 549.
 Smith v. Packard & Co., 399, 415.
 Smith v. Parker, 31, 397.
 Smith v. People, 43.
 Smith v. Postal Tel. Cable Co., 83.
 Smith v. Price, 359.
 Smith v. Richards, 408, 411.
 Smith v. Rochester, 201.
 Smith v. St. Louis & S. W. R. Co., 109.
 Smith v. Schoene, 166.
 Smith v. Seward, 15.
 Smith v. Simmons, 215.
 Smith v. Smalley, 382.
 Smith v. Smith, 132, 348, 464.
 Smith v. Southern R. Co., 243.
 Smith v. South Normanton Colliery Co., 177.
 Smith v. Spitz, 212.
 Smith v. Spooner, 423.
 Smith v. State, 263, 502, 582.
 Smith v. Stewart, 345.
 Smith v. Stone, 55.
 Smith v. Weeks, 493.
 Smith v. Wildes, 549.
 Smithies v. National Ass'n of Operative Plasterers, 436.
 Smithwick v. Ward, 231.
 Smits v. Hogan, 498.
 Snap v. People, 363.
 Snare & Triest Co. v. Friedman, 505.
 Snell v. Snow, 302.
 Snider v. Myers, 353.
 Snider v. St. Paul, 202.
 Snow v. Chandler, 124.

[The figures refer to pages]

- Snow v. Coe Brass Mfg. Co.**, 511.
Snyder v. Hannibal & St. J. R. Co., 213.
Soane v. Knight, 323, 324.
Sobleski v. St. Paul & D. R. Co., 122.
Sockman v. Keim, 403.
Solomon v. Bates, 413.
Solomons v. Dawes, 380.
Somboy v. Loring, 467.
Somerset (Duke of) v. Cookson, 360.
Somerville v. Hawkins, 332.
Songer v. Lynch, 379.
So Relle v. Western Union Tel. Co., 85.
Sorenson v. Balaban, 83.
Sorgenfrei v. Schroeder, 260.
Sotham v. Drovers' Telegram Co., 322.
South & N. A. R. Co. v. Henlein & Barr, 529.
Southcote v. Stanley, 171, 508.
South Dakota v. North Carolina, 197.
Southern Car & Foundry Co. v. Adams, 490.
Southern Development Co. v. Silva, 396, 406.
Southern Exp. Co. v. Sinclair, 370.
Southern Ry. v. Bailey, 547.
Southern R. Co. v. Cleveland, 366.
Southern R. Co. v. Grizzle, 23.
Southern R. Co. v. Shipp, 553.
Southern R. Co. v. Webb, 94.
South Royalton Bank v. Suffolk Bank, 66.
Southwestern Telegraph & Telephone Co. v. Myane, 535.
Sowers v. Parker, 399.
Spade v. Lynn & B. R. Co., 55, 56.
Spaits v. Poundstone, 297.
Spalding v. Vilas, 150, 151.
Sparhawk v. Union Pass. R. Co., 75.
Sparks v. Com., 263.
Sparks v. East Tennessee, V. & G. R. Co., 176.
Sparks v. McCreary, 441.
Sparrow v. Bromage, 236.
Spaulding v. Fisher, 475.
Spaulding v. Winslow, 99.
Spead v. Tomlinson, 415.
Spear v. Hiles, 487.
Spearman v. McCrary, 85.
Spears v. McCoy, 309.
Speckmann v. Kreig, 558.
Speed v. Atlantic & P. R. Co., 179.
Spees v. Boggs, 193.
Speir v. Brooklyn, 202.
Spelman v. Delano, 551.
Spence v. Mitchell, 381.
Spencer v. Amerton, 333.
Spencer v. Chicago, M. & St. P. R. Co., 537.
Spengler v. Davy, 482.
Sperry v. Mechanics' Clothing Co., 453.
Sperry v. Wilcox, 322.
Sperry & Hutchinson Co. v. Louis Weber & Co., 453.
Sperry & Hutchinson Co. v. Mechanics' Clothing Co., 451.
Sperry & Hutchinson Co. v. Rhodes, 289.
Spice v. Steinruck, 145, 149.
Spicer v. Jarrett, 497.
Spielberg v. Kuhn, 333.
Splering v. Andrae, 309.
Spitze v. Baltimore & O. R. Co., 123.
Spoor v. Spooner, 275.
Spotorno v. Fourichon, 304.
Sprights v. Hawley, 377.
Spray v. Ammerman, 364.
Springfield Fire & Marine Ins. Co. v. Keeseville, 201.
Springhead Spinning Co. v. Riley, 435.
Sproul v. Sloan, 387.
Spurr v. Benedict, 411.
Squire v. Hollenback, 369.
Squires v. State, 302.

[The figures refer to pages]

- | | |
|---|--|
| <p>Stacy Clarke, The, 272.
 Staeffler v. Menasha Wooden-
 ware Co., 38.
 Stafford v. Chicago, B. & Q. R.
 Co., 183.
 Stafford v. Ingersol, 40.
 Stahl v. Grover, 354.
 Standard Fertilizer Co. v. Van
 Valkenburgh, 30.
 Standard Oil Co. v. Anderson,
 179, 190.
 Standard Oil Co. v. Doyle, 440,
 441.
 Standard Oil Co. v. Parrish, 519.
 Standish v. Narragansett S. S.
 Co., 286.
 Stanhope v. Swafford, 226.
 Stanley v. Gaylord, 352, 371, 375.
 Stanley v. Powell, 55.
 Stanton v. Hart, 486, 489.
 Stark v. Chitwood, 421.
 Stark v. Johnson, 460.
 Starling v. Turner, 72.
 Starr v. Jackson, 353, 355.
 State v. Alford, 270.
 State v. Avery, 297.
 State v. Brady, 296.
 State v. Bush, 320.
 State v. Campbell, 283.
 State v. Clark, 263.
 State v. Crow, 256.
 State v. Curtis, 270.
 State v. Dalton & Fay, 583.
 State v. Daniels, 429.
 State v. Davis, 269.
 State v. Dierberger, 283.
 State v. Dixon, 261.
 State v. Dooley, 265, 266.
 State v. Elliot, 266.
 State v. Erie R. Co., 575.
 State v. Ferguson, 261.
 State v. Forsythe, 264.
 State v. Gentry, 261.
 State v. Gilman, 264.
 State v. Glidden, 441.
 State v. Godfrey, 256.
 State v. Hampton, 254.</p> | <p>State v. Harris, 140.
 State v. Hemphill, 257.
 State v. Hoyt, 582.
 State v. Jackson, 582.
 State v. Jacobs, 269.
 State v. Jones, 261, 270, 271.
 State v. Julow, 429.
 State v. Kennedy, 263.
 State v. Loser, 582.
 State v. Lund, 88.
 State v. Lunsford, 275.
 State v. McAfee, 254.
 State v. McDonald, 157, 260, 263.
 State v. Marfaudille, 264.
 State v. Martin, 261.
 State v. Matthews, 260.
 State v. Middleham, 261.
 State v. Milsaps, 254.
 State v. Mizner, 271.
 State v. Moffett, 571.
 State v. Moore, 264.
 State v. Morgan, 264, 265, 268.
 State v. Neal, 363, 364.
 State v. Norton, 300.
 State v. Omaha Nat. Bank, 372.
 State v. Parrott, 571.
 State v. Paul, 573.
 State v. Pittsburgh & C. R. Co.,
 250.
 State v. Shepard, 256.
 State v. Sherman, 261.
 State v. Shippey, 264.
 State v. Smith, 256.
 State v. Soale, 133.
 State v. Stewart, 435.
 State v. Tom, 582.
 State v. Totman, 262.
 State v. True Nell, 582.
 State v. Vannoy, 254.
 State v. White, 254, 572.
 State v. Williams, 116.
 State v. Wittles, 111.
 State v. Wolever, 149.
 State v. Woodward, 263.
 State v. Zeigler, 261.
 State of Kansas v. State of Colo-
 rado, 136.</p> |
|---|--|

[The figures refer to pages]

- State of South Dakota v. North Carolina**, 197.
State to Use of Wolff v. Berning, 377.
Statler v. George A. Ray Mfg. Co., 519.
Stauffer v. Young, 397.
Steamboat New World v. King, 524.
Stearns v. McGinty, 368.
Stearns v. Sampson, 255.
Stearns v. Titus, 284.
Stearns v. Vincent, 153.
Stedman v. O'Neill, 525.
Steed v. Knowles, 487.
Steele v. Burkhardt, 113.
Steele v. Crabtree, 154.
Steele v. Dunham, 150.
Steele v. Marsicano, 377, 379.
Stein v. Coleman, 359.
Steinbach v. Hill, 75.
Steiner v. Clisby, 404.
Steinke v. Bentley, 570.
Stelter v. Cordes, 539.
Stendal v. Boyd, 507.
Stephens v. Gravit, 486.
Stephens v. Myers, 254.
Stephens v. Wilson, 145.
Stephenson v. Corder, 93.
Stephenson v. Southern Pac. Co., 213.
Sterger v. Van Sicklen, 508.
Sterling v. Warden, 362.
Sternfels v. Metropolitan St. R. Co., 236.
Sterrett's Ex'r v. Kaster, 368.
Stevens v. Allen, 415.
Stevens v. Eames, 377.
Stevens v. Gordon, 384.
Stevens v. O'Neill, 275.
Stevens v. Rose, 389, 391, 393.
Stevens v. Rowe, 476.
Stevens v. Stevens, 365.
Stevenson v. Fitzgerald, 381.
Stevenson v. Hayden, 315.
Stevenson v. Love, 421.
Steward v. Young, 421.
Stewart v. Baltimore & O. R. Co., 247.
Stewart v. Bright, 372.
Stewart v. Cooley, 144.
Stewart v. Davis, 378.
Stewart v. Minnesota Tribune Co., 302.
Stewart v. Sonneborn, 482, 483, 489.
Stewart v. Stearns, 409.
Stickel v. Atwood, 404.
Stiles v. Comstock, 321.
Stillman v. White Rock Mfg. Co., 243.
Stillwater Water Co. v. Farmer, 69.
Stilwell v. Barter, 321.
Stimpson v. Achorn, 213.
Stitzell v. Reynolds, 302.
Stock v. Boston, 201.
Stockdale v. Ohnwhyn, 111.
Stockton v. Frey, 121.
Stockwell v. U. S., 226.
Stone v. Boston & A. R. Co., 88, 89.
Stone v. Chicago & N. W. R. Co., 272.
Stone v. Chicago & W. M. R. Co., 125.
Stone v. Crocker, 478, 483.
Stone v. Dry Dock, H. B. & B. R. Co., 547.
Stone v. New England Box Co., 353.
Stone v. Rabinowitz, 161.
Stone v. Stevens, 482, 489.
Stone v. Swift, 486.
Stone v. U. S., 243.
Stoney Creek Woolen Co. v. Smalley, 405.
Storey v. Early, 341.
Storey v. Wallace, 343.
Storrs v. Utica, 219.
Story v. Downey, 134.
Story v. Hammond, 8.
Story v. Jones, 295.
Stowe v. Heywood, 467, 472.

[The figures refer to pages]

- Stowell v. Otis, 356.
 Stranahan Bros. Catering Co. v. Colt, 213, 214.
 Strand v. Griffith, 409.
 Strauss v. Francis, 324.
 Strauss & Sons v. Schwab, 374, 379.
 Streeper v. Ferris, 496.
 Street v. Sinclair, 234.
 Streets v. Grand Trunk R. Co., 193.
 Streett v. Laumier, 367.
 Streety v. Wood, 333.
 Stringer v. Alabama Mineral R. Co., 524.
 Stringham v. Hilton, 179.
 Stringham v. Stewart, 194.
 Strobeck v. Bren, 102.
 Strodder v. Southern Granite Co., 123.
 Strom v. Strom, 134, 135.
 Strong v. Campbell, 36.
 Strong v. Strong, 407.
 Strouse v. Leipf, 166, 168, 522.
 Stroyan v. Knowles, 516.
 Strubing v. Mahar, 167.
 Stuart v. Bell, 336.
 Stuart v. Chapman, 234.
 Stuart v. Lovell, 324.
 Stuart v. News Pub. Co., 342.
 Stuart v. Phelps, 375.
 Stuart v. Press Pub. Co., 329.
 Stuart v. Simpson, 446.
 Stubbs v. Mulholland, 482, 484, 488.
 Studdard v. Trucks, 316.
 Studwell v. Shapter, 160.
 Stumps v. Kelley, 46.
 Sturges v. Bridgman, 578.
 Sullings v. Shakespeare, 319.
 Sullivan v. Dunham, 515.
 Sullivan v. Mississippi M. R. Co., 189.
 Sullivan v. Old Colony St. Ry., 74.
 Sullivan v. Royer, 577.
 Sullivan v. Strathan - Hutton - Evans Commission Co., 336.
 Sullivan v. Sullivan, 297.
 Sullivan v. Tloga R. Co., 88, 540.
 Sullivan v. Zeiner, 517.
 Summers v. Daviess County, 201.
 Sumner v. Beeler, 139.
 Sumner v. Buel, 295.
 Sumner v. Utley, 309.
 Sunderlin v. Bradstreet, 335.
 Sun Life Assurance Co. of Canada v. Bailey, 298.
 Sunman v. Brewin, 322.
 Sun Printing & Publishing Ass'n v. Schenck, 342.
 Supreme Lodge American Protective League of Baltimore City v. Unverzagt, 478, 479.
 Surocco v. Geary, 106.
 Susquehanna Fertilizer Co. v. Malone, 566, 579.
 Susquehanna Fertilizer Co. v. Spangler, 559.
 Sutor v. Wood, 482.
 Sutton v. Great Northern R. Co., 380.
 Sutton v. McConnell, 486.
 Sutton v. Wauwatosa, 114.
 Suydam v. Jackson, 391.
 Swaim v. Morris, 564.
 Swain v. Johnson, 450, 452, 453.
 Swain v. Mizner, 153.
 Swan v. Tappan, 421.
 Swart v. Rickard, 149.
 Sweeden v. State, 257.
 Sweeney v. Baker, 319, 320.
 Sweet v. Post Pub. Co., 294, 329.
 Sweetser v. Boston & M. R. Co., 115.
 Sweney v. Davidson, 398.
 Swift v. Moseley, 383.
 Swift v. Rounds, 397.
 Swift & Co. v. Allen, 440.
 Swift & Co. v. Johnson, 470.
 Swim v. Wilson, 60, 377.

[The figures refer to pages]

Swinarton v. Le Boutillier, 362, 511.

Swoboda v. Ward, 16.

Swords v. Edgar, 503, 511, 568.

Syeds v. Hay, 378.

Syford v. Shriver, 363.

Sykes v. Lawlor, 468.

Sylvester v. Craig, 386.

Sylvester v. Henrich, 416.

Sylvis v. Miller, 297, 299.

Symonds v. Hall, 154.

T

Tabor v. Robinson, 354.

Taendsticksfabriks Akticbolagat
Vulcan v. Myers, 440.

Taft v. Taft, 84.

Tagg v. McGeorge, 185.

Tainter v. Morristown, 359.

Talbert v. Charleston & W. C.
Ry., 500.

Talcott v. Henderson, 398.

Tallmadge v. Grannis, 134.

Tally v. Courter, 541.

Talmage v. Smith, 57.

Tarleton v. McGawley, 441.

Tarry v. Ashton, 220.

Tarver v. State, 253, 256.

Tasburgh v. Day, 421.

Tasker v. Stanley, 459.

Tattan v. Great Western R. Co.,
16.Taxicab & Touring Co. v. Caba-
niss, 500.

Taylor v. Adams, 269.

Taylor v. Alexander, 281.

Taylor v. Cumberland, 200.

Taylor v. Doremus, 144.

Taylor v. Felsing, 188.

Taylor v. Green, 167.

Taylor v. Haddonfield & C. Turn-
pike Co., 509.

Taylor v. Hall, 308.

Taylor v. Hanlon, 379.

Taylor v. Hayes, 356.

Taylor v. Hearst, 61, 294.

Taylor v. Home Tel. Co., 551.

Taylor v. Protestant Hospital
Ass'n, 205.

Taylor v. Jones, 357.

Taylor v. Manchester S. & L. R.
Co., 24.

Taylor v. Nostrand, 414.

Taylor v. Perkins, 308.

Taylor v. Plymouth, 106, 107.

Taylor v. Pullen, 168.

Taylor v. Welbey, 362.

Taylor v. Wright, 355.

Taylor v. Yonkers, 100.

Taylor County v. Standley, 581.

Taylor, Farr & Co. v. Western
Union Tel. Co., 247.T. B. Clark Co. v. Mt. Morris
Bank, 24.

Tellefsen v. Fee, 156.

Temperton v. Russell, 427, 443,
449, 450, 452, 453.Tempter v. Joplin & P. R. Co.,
544.Temple Co. v. Penn Mut. Life
Ins. Co., 379.

Templeton v. Williams, 574.

Templeton's Adm'r v. Lynchburg
Traction & Light Co., 541.

Ten Eyck v. Runk, 119.

Tennessee Coal Iron & R. Co. v.
Hayes, 177.

Terminal Co. v. Jacobs, 568.

Terre Haute & I. R. Co. v. Buck,
89.Terre Haute & I. R. Co. v. Voel-
ker, 533.

Terry v. Davis, 479.

Terry v. Fellows, 328.

Terry v. Munger, 27.

Terwilliger v. Wands, 83, 87, 313,
.318.Texarkana Water Co. v. Kizer,
386.Texas Midland R. Co. v. Booth,
550.

Texas & P. R. Co. v. Volk, 555.

Thacher v. Phinney, 134.

Thacker Coal Co. v. Burke, 445.

[The figures refer to pages]

- | | |
|--|--|
| <p>Thain v. Old Colony R. Co., 185.
 Thayer v. Smoky Hollow Coal Co., 182.
 Thibault v. Sessions, 345.
 Thibodaux v. Thibodaux, 139.
 Thiel v. Bull's Ferry Land Co., 366.
 Thomas v. Altoona & L. V. Electric R. Co., 222.
 Thomas v. Bradbury Agnew & Co., 325, 338, 340.
 Thomas v. Central R. Co., of New Jersey, 122.
 Thomas v. Cincinnati, N. O. & T. P. R. Co., 432, 456.
 Thomas v. Croswell, 330.
 Thomas v. Harrington, 218.
 Thomas v. Philadelphia & R. R. Co., 537.
 Thomas v. Winchester, 22, 93, 518.
 Thomason v. Gray, 261.
 Thompson v. Andrews, 384.
 Thompson v. Beacon Valley Rubber Co., 488.
 Thompson v. Clemens, 14.
 Thompson v. Flint & P. M. R. Co., 556.
 Thompson v. Gibson, 567.
 Thompson v. Jackson, 148.
 Thompson v. Koewing, 399.
 Thompson v. Los Angeles & S. D. R. Co., 551.
 Thompson v. Lowell, L. & H. St. R. Co., 221.
 Thompson v. Millar, 469.
 Thompson v. Nye, 341.
 Thompson v. Phoenix Ins. Co., 401.
 Thompson v. Salt Lake Rapid Transit Co., 548.
 Thompson v. Seaboard Air Line R. Co., 551.
 Thompson v. Shackell, 323.
 Thompson Grocery Co. v. Phillips, 512.
 Thomson v. Pentecost, 417.</p> | <p>Thorley v. Lord Kerry, 315, 316.
 Thorn v. Blanchard, 335.
 Thornhill v. Carpenter-Morton Co., 519.
 Thornton v. Taylor, 260.
 Thorogood v. Bryan, 551.
 Thorp v. Burling, 383.
 Thorp v. Hough, 418.
 Thorpe v. Wray, 273.
 Thrall v. Lathrop, 377.
 Threefoot v. Nuckols, 484.
 Thurber v. Eastern Building & Loan Ass'n, 484.
 Thurston v. Blanchard, 375.
 Thurston v. Wright, 488.
 Thyng v. Fitchburg R. Co., 194.
 Tidd v. Skinner, 467.
 Tift v. Tift, 158.
 Tighe v. Wicks, 311.
 Tillett v. Ward, 347.
 Tillmore v. Moore, 471, 472.
 Tillson v. Robbins, 315.
 Tindle v. Birkett, 62, 404.
 Tinker v. New York, O. & W. R. Co., 558.
 Tittlebaum v. Boehmcke, 471.
 Tobey v. Webster, 354.
 Tobias v. Harland, 74, 421.
 Tobin v. Bell, 285.
 Tobin v. Deal, 363.
 Tobin v. Shaw, 82.
 Todd v. Hawkins, 335.
 Todd v. Jackson, 354.
 Tolan v. Hodgeboom, 27.
 Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co., 431.
 Toledo Disposal Co. v. State, 575.
 Toll Bridge Co. v. Betsworth, 115.
 Tolman v. Syracuse, B. & N. Y. R. Co., 556.
 Tom v. Nichols-Fifield Shoe Mach. Co., 519.
 Tomlinson v. Armour & Co., 518.
 Tom Lysle, The, 527.
 Tompkins v. Clay St. R. Co., 124.
 Tompkins v. Knut, 262.</p> |
|--|--|

[The figures refer to pages]

- Tompkins v. Marine Engine & Mach. Co., 179.
 Tonawanda R. Co. v. Munger, 58, 346, 347.
 Toncray v. Dodge County, 152.
 Tonnesen v. Ross, 183.
 Toogood v. Spryng, 337.
 Toomey v. Delaware, L. & W. R. Co., 488.
 Toplitz v. Bauer, 373.
 Topolewski v. Plankinton Packing Co., 486.
 Tornroos v. R. H. White Co., 467, 471.
 Torp v. Clemons, 387.
 Torrey v. Field, 320, 321.
 Totten v. Cole, 364.
 Tousley v. Pacific Electric R. Co., 550.
 Towaliga Falls Power Co. v. Sims, 562, 577.
 Towle v. Lovet, 372.
 Towne v. Thompson, 502.
 Towne v. Wiley, 161.
 Town of Newtown v. Lyons, 110.
 Town of Southeast v. New York, 201.
 Townsend v. Boston, 201.
 Townsend v. Cowles, 401.
 Townsend v. Wilmington City R. Co., 462.
 Townshend v. Moore, 392.
 Train v. Boston Disinfecting Co., 109.
 Trainer v. Wolff, 365.
 Transportation Co. v. Standard Oil Co., 437, 439.
 Travelers' Protective Ass'n of America v. Smith, 400.
 Travers v. Hartman, 471, 472.
 Treasurer v. Wygall, 197.
 Trenton Mut. Life & Fire Ins. Co. v. Perrine, 135.
 Treusch v. Kamke, 133.
 Trewatha v. Buchanan Gold Min. & Mill Co., 193.
 Triggs v. Sun Printing & Publishing Ass'n, 324.
 Trim v. Fore River Ship Building Co., 538.
 Trimble v. Morrish, 333.
 Trimble v. Reid, 411.
 Triscony v. Orr, 383.
 Trogden v. Henn, 261.
 Trout v. Watkins Livery & Undertaking Co., 25.
 Trovillo v. Tilford, 355.
 Trowbridge v. True, 43.
 Troy & B. R. Co. v. Boston, H. T. & W. R. Co., 359.
 True & True Co. v. Woda, 547.
 Truesdell v. Combs, 147.
 Truitt v. Warrington, 355.
 Trumbull v. Trumbull, 466.
 Trustees of Geneva v. Brush Electric Co., 238, 239.
 Trustees of German Evangelical Congregation of New Elm v. Hoessli, 359.
 Trustees of Village of Canandaigua v. Foster, 239.
 Tuberville v. Savage, 254, 256, 257.
 Tubular Rivet & Stud Co. v. Exeter Boot & Shoe Co., 450, 453.
 Tubwomen v. Brewers of London, 424, 428.
 Tucker v. Burt, 9.
 Tucker v. Jerris, 234, 235.
 Tucker v. Tucker, 466.
 Tucker v. Wright, 385.
 Tuebner v. California St. R. Co., 558.
 Tullay v. Reed, 263.
 Tunbridge Wells' Dipper Case, 71.
 Tunstall v. Christian, 517.
 Tunstall v. Stearns Coal Co., 435.
 Tupper v. Clark, 522.
 Turner v. Dinnegar, 484.
 Turner v. Hearst, 343, 344.
 Turner v. St. Clair Tunnel Co., 250.

[The figures refer to pages]

- Turner v. Southern Power Co., 536.
 Turner v. Sullivan, 330.
 Turton v. New York Recorder Co., 343.
 Tutein v. Hurley, 87.
 Tuttle v. Atlantic City R. Co., 90, 550.
 Tuttle v. Bishop, 300.
 Tuttle v. Buck, 437.
 Tuttle v. Gilbert Mfg. Co., 14, 501.
 Twigg v. Ryland, 521.
 Twitchell v. Nelson, 450, 453, 454.
 Twitchell v. Shaw, 155.
 Twombly v. Monroe, 345.
 Tyson v. McGuineas, 241, 243.
- U**
- Ubelmann v. American Ice Co., 535.
 Ullman v. Barnard, 387.
 Unckles v. Hentz, 401.
 Underhill v. Murphy, 435.
 Union Associated Press v. Heath, 299.
 Union Bridge Co. v. Teehan, 180.
 Union Pac. R. Co. v. Artist, 205.
 Union Pac. R. Co. v. Cappler, 11.
 Union Pac. R. Co. v. Daniels, 180.
 Union Pac. R. Co. v. Harris, 125.
 Union Pac. R. Co. v. Milliken, 183.
 Union Pac. R. Co. v. Mitchell, 525.
 Union Pac. R. Co. v. Reuf, 435.
 Union Pac. R. Co. v. Young, 554.
 Union Stockyards Co. v. Chicago, B. & Q. R. Co., 238.
 United Rys. & Electric Co. v. Dean, 540.
 United Rys. & Electric Co. of Baltimore v. State, 41.
 United Shoe Machinery Co. v. Holt, 383.
 U. S. v. Block, 306.
 U. S. v. Bostwick, 389.
 U. S. v. Hamilton, 582.
 U. S. v. Holmes, 135.
 U. S. v. Kane, 435, 441.
 U. S. v. Klerman, 254.
 U. S. v. Lee, 108, 139.
 U. S. v. Long, 5.
 U. S. v. Magoon, 348.
 U. S. v. Paquete Habana, The, 108.
 U. S. v. Tygh Valley Land & Live Stock Co., 136.
 United States Exp. Co. v. Hutchins, 529.
 United States Frame & Picture Co. v. Horowitz, 441.
 United States Smelting Co. v. Sisam, 574.
 Uppington v. New York, 215, 221, 222, 223.
 Upton v. Times-Democrat Pub. Co., 294, 316.
 Urbas v. Duluth, M. & N. R. Co., 505.
 Urquhart v. Ogdensburg, 200.
 Urtz v. New York Cent. & H. R. R. Co., 416.
 Usher v. West Jersey R. Co., 245.
 Usill v. Hales, 329.
 Utley v. Hill, 34.
- V**
- Valley v. Boston & M. R. Co., 126.
 Van Ankin v. Westfall, 307.
 Van Antwerp v. Linton, 172, 173.
 Vanarsdale v. Lavery, 428.
 Van Auken v. Chicago & W. M. R. Co., 533.
 Van Bergen v. Van Bergen, 574.
 Van Bracklin v. Fonda, 404.
 Van Brunt v. Schenck, 358.
 Vance v. Atchison, T. & S. F. R. Co., 533.
 Vance v. Louisville Courier-Journal Co., 324.
 Vance v. Supreme Lodge of Fraternal Brotherhood, 409.
 Vanceburg Tel. Co. v. Bevis, 554.
 Van Cleve v. Rook, 134.

[The figures refer to pages]

- Vandenburg v. Truax, 91.
 Van Derveer v. Sutphin, 320.
 Van Deusen v. Young, 369.
 Van De Vere v. Kansas City, 565.
 Van De Wiele v. Garbade, 417.
 Vandiver v. Pollak, 238.
 Vane v. Barnard (Lord), 392.
 Vanesse v. Catsburg Coal Co., 16.
 Van Etten v. Noyes, 522.
 Van Heusen v. Argenteau, 304.
 Van Horn v. Van Horn, 440, 580, 581, 582, 583.
 Van Ingen v. Star Co., 82.
 Van Inwegen v. Port Jervis, M. & N. Y. R. Co., 96, 104.
 Van Leuven v. Lyke, 347.
 Van Nortwick v. Holbine, 527.
 Van Oss v. Synon, 32.
 Van Pelt v. McGraw, 49.
 Van Rensselaer v. Dole, 301.
 Van Slochem v. Villard, 400.
 Van Steenburgh v. Tobias, 232.
 Vanvactor v. State, 271.
 Van Vechten v. Hopkins, 302.
 Variety Mfg. Co. v. Landaker, 540.
 Vassar College v. Loose-Wiles Biscuit Co., 290.
 Vasse v. Smith, 161.
 Vaughan v. Marable, 497.
 Vaughan v. Watt, 380, 381.
 Vaughn v. Bridgham, 515.
 Vaughn v. Congdon, 147.
 Vavasseur v. Krupp, 198.
 Vegelahn v. Guntner, 425, 434.
 Vencill v. Quincy, O. & K. C. R. Co., 541.
 Vernol v. Vernol, 406.
 Verplanck v. Van Buren, 581.
 Vicars v. Wilcocks, 317.
 Vick v. New York Cent. & H. R. R. Co., 178.
 Vickers v. Wilcocks, 87.
 Victorian Ry. Com'rs v. Coultas, 83.
 Vilett v. Moler, 417.
 Village of Jefferson v. Chapman, 200.
 Village of Pine City v. Munch, 577.
 Villepigue v. Shular, 470.
 Villers v. Monsley, 314, 315.
 Vinal v. Core, 482, 488.
 Vincennes Water Supply Co. v. White, 222.
 Vining v. Baker, 382.
 Vinson v. Flynn, 481.
 Vinton v. Weaver, 282.
 Vittum v. Gilman, 119.
 Vivian v. Allen, 418.
 Vizetelly v. Mudle's Select Library, 299.
 Vogel v. American Bridge Co., 192.
 Vogel v. New York, 224, 225.
 Voll v. Butler, 269.
 Von Kettler v. Johnson, 147.
 Von Thodorovich v. Franz Josef Beneficial Ass'n, 290.
 Von Trebra v. Laclede Gaslight Co., 554.
 Vosbeck v. Kellogg, 223.
 Voshefskey v. Hillside Coal & Iron Co., 251.
 Voss v. Delaware, L. & W. R. Co., 184.
 Voss v. Howard, 473.
 Vossel v. Cole, 116.
 Vredenburg v. Behan, 58.
- W**
- Wabash R. Co. v. Engleman, 359.
 Wabash R. Co. v. McDaniels, 182, 183.
 Wabash, St. L. & P. R. Co. v. Shacklet, 97.
 Wachsmuth v. Merchants' Nat. Bank, 278.
 Wachter v. Quenzer, 320, 322.
 Waddey Co. v. Richmond Typographical Union, 430, 434, 435.
 Wade v. Kalbfleisch, 118.

[The figures refer to pages]

- | | |
|--|--|
| <p>Wade v. Miller, 566.
 Wadsworth v. Treat, 82.
 Wagen v. Minneapolis & St. L. R. Co., 177.
 Wagener v. Bill, 166.
 Waggoner v. Jermaine, 567.
 Wagner v. Bissell, 348.
 Wagner v. New York Cent. & St. L. R. Co., 184.
 Wagner v. Scott, 340.
 Wahle v. Reinbach, 575.
 Wakelin v. Morris, 165.
 Wakely v. Johnson, 486.
 Wakeman v. Dalley, 396.
 Walbert v. Trexler, 178.
 Walcott v. Keith, 382.
 Wald v. Pittsburg, C., C. & St. L. R. Co., 529.
 Walden v. Conn, 369, 454.
 Waldron v. Sperry, 490.
 Wales v. Miner, 460.
 Wales v. Stetson, 571.
 Walker v. Cronin, 430, 445.
 Walker v. Hunt, 360.
 Walker v. Martin, 491.
 Walker v. Strosnider, 516.
 Walker v. Tribune Co., 313, 317.
 Walkley v. Bostwick, 422.
 Wall v. Cameron, 501.
 Wall v. Lee, 272.
 Wall v. Lit, 55.
 Wall v. Osborn, 230.
 Wall v. Trumbull, 156.
 Wallace v. Homestead Co., 303, 321.
 Wallace v. Jameson, 337.
 Wallace v. Morss, 160.
 Wallace v. Pennsylvania R. Co., 540.
 Waller v. Bowling, 385.
 Walsh v. Brown, 358.
 Walsh v. Fitchburg R. Co., 507.
 Walsh v. New York & N. E. R. Co., 249.
 Walsh v. Peet Valve Co., 186.
 Walter v. Bennett, 29.
 Walter v. Sample, 487.</p> | <p>Walters v. Chamberlin, 366.
 Walters v. Eaves, 413.
 Walters v. Nettleton, 118.
 Walther v. Southern Pac. Co., 524.
 Walton v. New York Cent. Sleeping Car Co., 213.
 Walton, Witten & Graham v. Miller's Adm'x, 232.
 Wamsganz v. Wolff, 235.
 Wamsley v. Atlas S. S. Co., 373.
 Wandsworth v. United Tel. Co., 349.
 Wangelin v. Goel, 359.
 Wannamaker v. Burke, 175.
 Ward v. Conatser, 162.
 Ward v. Dick, 322.
 Ward v. New England Fibre Co., 189.
 Ward v. Pullman Co., 518.
 Ward v. St. Vincent's Hospital, 205.
 Ward v. Thompson, 33.
 Ward v. Weeks, 87, 299.
 Warfield, Ex parte, 462.
 Warfield v. Clark, 405.
 Warner v. Benjamin, 398.
 Warner v. Chamberlain, 522.
 Warner v. Hoisington, 353.
 Warner v. Vallily, 375.
 Warnock v. Mitchell, 297.
 Warnock Uniform Co. v. Garifalos, 417.
 Warren v. Banning, 170.
 Warren v. Manchester St. R. Co., 554.
 Warren v. Ritchie, 406.
 Warren v. Warren, 465.
 Warren Mills v. New Orleans Seed Co., 360.
 Wartman v. Swindell, 72, 115, 501.
 Washburn v. Abrams, 467, 468, 470.
 Washburn v. Cooke, 334.
 Washington v. Episcopal Church of St. Peter's, 568.</p> |
|--|--|

[The figures refer to pages]

- Washington, A. & Mt. V. R. Co. v. Vaughan, 530.
 Washington Market Co. v. Claggett, 237.
 Washington & G. R. Co. v. McDade, 179.
 Wasmer v. Delaware, L. & W. R. Co., 551, 570.
 Wason v. Walker, 328.
 Waterbury v. Lockwood, 357.
 Waterbury v. Waterbury Traction Co., 239.
 Waterman v. Hall, 352.
 Waterman v. Shipman, 88.
 Watermann v. Visalia Electric R. Co., 544.
 Waters v. Barton, 246.
 Watkin v. Hall, 321.
 Watkins v. Rist, 541.
 Watson v. Augusta Brewing Co., 518.
 Watson v. Cain, 487.
 Watson v. Cross, 41.
 Watson v. Detroit Journal Co., 296.
 Watson v. Dilts, 85, 255.
 Watson v. Jones, 412.
 Watson v. Rinderknecht, 267.
 Watson v. Stever, 27.
 Watson v. Sutherland, 360.
 Watson v. Tripp, 219.
 Watson v. Watson, 156.
 Watters & Son v. Retail Clerks' Union No. 479, 317, 318.
 Watts' Adm'rs v. Kinney, 241.
 Way v. Davidson, 382.
 Way v. Ryther, 399.
 Weaver v. Devendorf, 150, 151.
 Webb v. Beavan, 305.
 Webb v. Drake, 439.
 Webb v. Fisher, 143.
 Webb v. Gray, 491.
 Webb v. Portland Mfg. Co., 70.
 Webb v. Rockefeller, 405.
 Webb v. Rome, W. & O. R. Co., 96.
 Webber v. Gay, 156.
 Webber v. Piper, 181.
 Weber v. Kansas City Cable R. Co., 525.
 Webster v. Drinkwater, 28.
 Webster v. Watts, 283.
 Weeks v. McNulty, 528.
 Wehle v. Connor, 153.
 Weick v. Lander, 89.
 Weickgenant v. Eccles, 453.
 Weik v. Southern Pac. Co., 506.
 Weikel v. Sterns, 402, 403.
 Weil v. Dry Dock, E. B. & B. R. Co., 553.
 Weil Bros. & Co. v. Cohn, 581.
 Weinstocker v. Marks, 440.
 Weir v. Haverford Electric Light Co., 541.
 Weise v. Grove, 411.
 Weiser v. Holzman, 519.
 Weiser v. Zeisinger, 372.
 Welch v. Louis, 354.
 Welch v. Mohr, 378.
 Welch v. Seattle & M. R. Co., 71.
 Welch v. Stowell, 573.
 Welch v. Waterbury Co., 194.
 Welch v. Wesson, 113.
 Weldon v. De Bathe, 134.
 Weldon v. Times Book Co., 299.
 Weldon v. Winslow, 134.
 Welker v. Metcalf, 31.
 Welle v. Celluloid Co., 16, 180.
 Weller v. Jersey City, H. & P. St. R. Co., 137, 138.
 Wellington v. Downer Kerosene Oil Co., 22, 518.
 Wells v. Cook, 404.
 Wells v. Howell, 348.
 Wells & Richardson Co. v. Abraham, 451.
 Welsh v. Bell, 154, 352.
 Welsh v. Tri-City R. Co., 547.
 Welsh v. Wilson, 153.
 Welsund v. Schueller, 287.
 Wenger v. Phillips, 488.
 Wennell v. Dowson, 471.
 Wentworth v. Portsmouth & D. R. R., 354.

[The figures refer to pages]

- Wentworth v. Waterbury, 552.
Wenzlick v. McCotter, 570.
Werner v. Flies, 368.
Wert v. Potts, 232.
Wesley v. Native Lumber Co., 439.
Wesselhoeft v. Schanze, 410.
Wesson v. Washburn Iron Co., 561.
West v. Bristol Tramways Co., 515.
Westberry v. Clanton, 283.
West Chicago St. R. Co. v. Horne, 233.
West Chicago St. R. Co. v. Kromshinsky, 531.
West Chicago St. R. Co. v. Liderman, 550, 555.
Westcott v. Middleton, 563.
Westcott v. Miller, 133.
Western Assur. Co. v. Towle, 27.
Western College of Homeopathic Medicine v. Cleveland, 200.
Western Counties Manure Co. v. Lawes Chemical Manure Co., 49, 423.
Western Saving Fund Soc. v. Philadelphia, 201.
Western Stone Co. v. Whalen, 183.
Western Tube Co. v. Zang, 122.
Western Union Tel. Co. v. McCaul, 85.
Western Union Tel. Co. v. McGill, 38.
Western Union Tel. Co. v. Westmoreland, 85.
Western & A. R. Co. v. Casteel, 555.
Western & A. R. R. v. Meigs, 122.
Western & A. R. Co. v. Strong, 245.
Westervelt v. Nat. Paper & Supply Co., 453.
West Ham Central Charity Board v. Company of Proprietors, etc., 391.
Westinghouse Electric & Mfg. Co. v. Heimlich, 180.
West Jersey R. Co. v. Ewan, 533.
Westlake v. Westlake, 464, 465.
West Mahanoy Tp. v. Watson, 103.
Weston v. Commercial Advertiser Ass'n, 295.
Weston v. Weston, 462.
Westover v. Grand Rapids R. Co., 535.
West Pratt Coal Co. v. Dorman, 516.
West & Bro. v. Louisville, C. & L. R. Co., 569.
Wetherbee v. Marsh, 342.
Wetherbee v. Partridge, 217.
Wetmore v. Mellinger, 479.
Whalen v. Citizens' Gaslight Co., 555.
Whalen v. Pennsylvania R. Co., 233.
Whaley v. Wilson, 574.
Whatman v. Pearson, 212.
Wheatley v. Baugh, 69.
Wheeler v. Berry, 187.
Wheeler v. Lawson, 384.
Wheeler v. Norton, 346.
Wheeler v. Pereles, 388.
Wheeler v. Price, 467.
Wheeler & Wilson Mfg. Co. v. Heil, 166.
Wheeler & Wilson Mfg. Co. v. Jacobs, 158, 160.
Wheelock v. Jacobs, 69.
Whidden v. Seelye, 241, 243.
Whipple v. Fair Haven, 574.
Whipple v. Fuller, 479.
Whisten v. Brengal, 169.
Whitaker v. Gavit, 137.
Whitcomb v. Cook, 279.
White v. Allen, 387.
White v. Apsley Rubber Co., 494.
White v. Barnes, 116.
White v. Bond County, 203.
White v. Carr, 486.

[The figures refer to pages]

- White v. Chicago & N. W. R. Co., 540.
 White v. Elwell, 361.
 White v. Griffin, 356.
 White v. McQueen, 284.
 White v. Mellin, 420.
 White v. Montgomery, 227.
 White v. Morse, 144.
 White v. Moseley, 366.
 White v. Murtland, 469, 470.
 White v. Nellis, 468.
 White v. Nicholls, 335.
 White v. Phelps, 382.
 White v. Ross, 463.
 White v. Sun Pub. Co., 343, 344.
 White v. Turner, 231.
 White v. Webb, 368, 387.
 White v. White, 583.
 Whitehead v. Comstock & Co., 502.
 Whitehead v. Reader, 176.
 Whitenack v. Philadelphia & R. Co., 570.
 Whiting v. Whiting, 380.
 Whitman v. Fisher, 552.
 Whitmore v. Brown, 561.
 Whitney v. Bartholomew, 564.
 Whitney v. Huntington, 389.
 Whitney v. New York, N. H. & H. R. Co., 503.
 Whittaker v. McQueen, 322.
 Whittaker v. President, etc., of Delaware & H. Canal Co., 184.
 Whittaker v. Sanford, 276.
 Whitten v. Fitzwater, 410.
 Wickersham v. Johnson, 583.
 Wicks v. De Witt, 200.
 Wiekel v. Sterns, 402.
 Wieman v. Mabee, 335.
 Wier's Appeal, 567.
 Wiest v. Electric Traction Co., 236.
 Wiggin v. Coffin, 488.
 Wiggin v. St. Louis, 218.
 Wightman v. Catlin, 498.
 Wilbert v. Sheboygan L., P. & R. Co., 526.
 Wilbur v. Stokes, 155.
 Wilcox v. American Telephone & Telegraph Co., 409.
 Wilcox v. Luco, 198.
 Wilcox v. Moon, 299.
 Wildey v. Crane, 497.
 Wildrig v. Oyer, 306.
 Wiley v. West Jersey R. Co., 551.
 Wiley v. Wiley, 391.
 Wilkinson v. Detroit Steel & Spring Works, 224.
 Wilkinson v. Downton, 86, 255.
 Wilkinson v. Goodfellow-Brooks Shoe Co., 480.
 Wilkinson v. Wilkinson, 390.
 Willard v. Holmes, Booth & Haydens, 479.
 Willard v. Kimball, 154.
 Willet v. Willet, 27.
 Willey v. Laraway, 369.
 Willi v. Lucas, 231.
 William Johnson & Co. v. Johansen, 542.
 Williams v. Belthany, 383.
 Williams v. Brassell, 383.
 Williams v. Dickenson, 7.
 Williams v. Dixon, 364.
 Williams v. Gill, 214.
 Williams v. Godkin, 314.
 Williams v. Grealy, 534.
 Williams v. Hathaway, 365.
 Williams v. Hays, 162, 164.
 Williams v. Holdredge, 308.
 Williams v. Karnes, 315.
 Williams v. Miller, 153.
 Williams v. Missouri Pac. R. Co., 182.
 Williams v. Pomeroy Coal Co., 129.
 Williams v. Riddle, 316.
 Williams v. Smith, 280.
 Williams v. Spencer, 153.
 Williams v. Underhill, 82, 86.
 Williams v. Woodhouse, 485.
 Williamson v. Freer, 298, 338.
 Williamson v. Seeley, 379.

[The figures refer to pages]

- | | |
|--|--|
| <p>Williamston & T. R. Co. v. Battle, 361.
 Willis v. Muscogee Mfg. Co., 428.
 Willis v. Providence Telegram Pub. Co., 93.
 Willis v. Second Ave. Traction Co., 90.
 Willis & Bro. v. Hudson, 355.
 Willitts v. Chicago, B. & K. O. R. Co., 570.
 Willner v. Silverman, 430.
 Wills v. Ashland Light, Power & St. R. Co., 79.
 Wills v. Central Ice & Cold Storage Co., 581.
 Willson v. Colorado & S. R. Co., 526.
 Willy v. Mulledy, 32, 35, 39.
 Wilmerding v. Postal Telegraph Cable Co., 213.
 Wilmot v. McPadden, 507.
 Wilms v. Jess, 516.
 Wilson v. Banner Lumber Co., 178.
 Wilson v. Brett, 524, 527.
 Wilson v. Central of Georgia R. Co., 551.
 Wilson v. Cottman, 316.
 Wilson v. Dubois, 419, 421.
 Wilson v. Garrard, 158.
 Wilson v. Haley Livestock Co., 355.
 Wilson v. Hey, 442.
 Wilson v. Hill, 359.
 Wilson v. Marks, 319.
 Wilson v. Merry, 191.
 Wilson v. Mineral Point, 359.
 Wilson v. New York, 141.
 Wilson v. Phoenix Powder Mfg. Co., 559.
 Wilson v. Wheeling, 219.
 Wilson v. White, 220.
 Wilson v. Willimantic Linen Co., 192.
 Wilson v. Young, 153.
 Winborne v. Mitchell, 154.
 Winchell v. Argus Co., 314.</p> | <p>Winchester v. Everett, 279, 280.
 Windfall Mfg. Co. v. Patterson, 564.
 Wing v. Milliken, 377, 386.
 Winner v. Oakland Township, 552.
 Winsette v. Hunt, 311.
 Winter v. Atkinson, 266.
 Winters v. Boll, 180.
 Wintringham v. Lafoy, 154, 352.
 Wirtz v. Eagle Bottling Co., 440.
 Wise v. Ackerman, 180.
 Wise & Co. v. Morgan, 547.
 Witcher v. Jones, 341.
 Withers v. Brooklyn Real Estate Exch., 511.
 Withey v. Fowler, 462.
 Witt v. St. Paul & N. P. R. Co., 354.
 Wixon v. Newport, 201.
 Wodell v. Coggeshall, 470.
 Wofford v. Meeks, 295.
 Wolf v. Grand Rapids H. & C. R. Co., 530.
 Wolf v. Kilpatrick, 569.
 Wolf v. Mills, 226.
 Wolf v. Smith, 39.
 Wolff & Co. v. Lozier, 167, 168.
 Womack v. Circle, 485.
 Wood v. Boyle, 324.
 Wood v. Coney Island & B. R. Co., 552.
 Wood v. Currey, 130.
 Wood v. Danbury, 556.
 Wood v. Fisk, 380.
 Wood v. Graves, 494.
 Wood v. Lane, 274.
 Wood v. La Rue, 363.
 Wood v. Leadbitter, 361.
 Wood v. Manly, 361.
 Wood v. New York Cent. & H. R. R. Co., 61.
 Wood v. Phillips, 269.
 Wood v. Roeder, 400.
 Wood v. Snider, 58, 347.
 Wood v. State, 582.
 Wood v. Waud, 72.</p> |
|--|--|

[The figures refer to pages]

Wood v. Wood, 135.
 Woodbury v. Tampa Waterworks Co., 49.
 Wooden v. Western New York & P. R. Co., 245, 249.
 Woodhouse v. Walker, 390.
 Woodling v. Knickerbocker, 226.
 Woodman v. Metropolitan R. Co., 216, 218.
 Woodman v. Prescott, 489.
 Woodruff v. Bowen, 508.
 Woodruff v. Hughes, 581, 584.
 Woodruff v. North Bloomfield Gravel Min. Co., 577.
 Woods v. Wiman, 337.
 Woodson v. Winchester, 416.
 Woodward v. Barnes, 167.
 Woodward v. Gates, 390.
 Woodward v. Miller, 395.
 Woodward v. Washburn, 473.
 Woodworth v. Mills, 490.
 Wooley v. Carter, 385.
 Wooley v. Edson, 356, 368.
 Woolf v. Chalker, 347, 523.
 Wooten v. Martin, 306.
 Worden v. New Bedford, 202.
 Worden & Co. v. California Fig Syrup Co., 112.
 Wormouth v. Cramer, 297.
 Worth v. Gilling, 522.
 Worthen v. Garno, 361.
 Worthen v. Love, 522.
 Worthington v. Mencer, 548.
 Wright v. Bank of Metropolis, 386, 387.
 Wright v. Big Rapids Door & Blind Mfg. Co., 219.
 Wright v. Brown, 397.
 Wright v. Clark, 352.
 Wright v. Compton, 233.
 Wright v. Harris, 495.
 Wright v. Ramscot, 352.
 Wright v. Southern R. Co., 37.
 Wright v. Templeton, 99.
 Wright v. Woodgate, 339.
 Wrightsville & T. R. Co. v. Holmes, 366.

Wuensch v. Morning Journal Ass'n, 342.
 Wueppesahl v. Connecticut Co., 552.
 Wustrack v. Hall, 399.
 Wyke v. Wilson, 358.
 Wykoff v. Stevenson, 379.
 Wymore v. Mahaska County, 553.
 W. & A. Fletcher Co. v. International Ass'n, 434.

Y

Yakavicz v. Valentukevicious, 306.
 Yates v. Lansing, 142, 143.
 Yates v. State, 283.
 Yealy v. Fink, 150, 151.
 Yeates v. Reed, 163.
 Yeaw v. Williams, 99.
 Yost v. Grand Trunk R. Co., 471.
 Youmans v. Smith, 299, 328.
 Young v. City Council of Charleston, 203.
 Young v. Fox, 342.
 Young v. Gormley, 82.
 Young v. Kansas City, St. J. & C. B. R. Co., 40.
 Young v. Leach, 476.
 Young v. Miller, 305.
 Young v. Muhling, 161.
 Young v. New Jersey & N. Y. R. Co., 194.
 Young v. St. Louis, I. M. & S. R. Co., 524.
 Young v. South Boston Ice Co., 212.
 Young v. Young, 360.
 Younggreen v. Shelton, 454.
 Yousling v. Dare, 297.
 Yundt v. Hartrunft, 459.

Z

Zabriski v. Smith, 118.
 Zabriskie v. Jersey City & B. R. Co., 575.

[The figures refer to pages]

- | | |
|---|---|
| <p>Zachary v. Pace, 380.
 Zang v. Adams, 399.
 Zanbizer v. Hefner, 360.
 Zebley v. Storey, 491.
 Zebrowski v. Warner Sugar Re-
 fining Co., 187.
 Zellff v. Jennings, 168.
 Zell v. Dunaway, 259.
 Zellerbach v. Allenberg, 581.
 Zibbell v. Grand Rapids, 540.</p> | <p>Zier v. Hoffin, 88, 299.
 Zierenberg v. Labouchere, 315.
 Zimmerman v. Shreeve, 369.
 Zimmerman v. Whiteley, 463.
 Zinc Carbonate Co. v. First Nat.
 Bank, 208.
 Zinn v. Rice, 493, 495.
 Zinserling v. Journal Co., 317.
 Zoltovski v. Gzella, 533.
 Zulkee v. Wing, 169.</p> |
|---|---|

CHAP. TORTS—43

*

INDEX

[THE FIGURES REFER TO PAGES]

A

ABATEMENT,

By death, 117-120.

Of nuisance, 571-573.

ABUSE OF PROCESS, 493-495.

ACCIDENT,

Liability for, 53-58.

ACCORD AND SATISFACTION, 120-123.

ACTION PERSONALIS MORITUR CUM PERSONA, 117.

ACT OR OMISSION,

As constituting tort, 40-42.

ACTS OF STATE, 107, 108.

ADMIRALTY,

Concurrent jurisdiction with law, 43.

Contributory negligence, 542.

ADVICE OF COUNSEL,

As constituting probable cause, 485-487.

AGENTS,

Liability of, in general, 169-175.

For conversion, 377-379.

AIRSHIP,

Trespass by, 349.

ALIENATION OF AFFECTIONS,

See Interference with Domestic Relations.

ALLURING NUISANCE,

Recovery by infant trespasser, 505-507.

ANIMALS,

Trespass by, 346, 347.

Liability of keeper, 520-523.

ARREST,

Under process, 277-282.

Without warrant, 282-285.

Liability of one assisting officer, 281, 282.

[The figures refer to pages]

ASSAULT, 253-256.

For defenses, see Battery.

ASSIGNMENT OF CAUSE OF ACTION, 136, 137.

ASSUMPTION OF RISK,

By servant, 186-194.

ATTRACTIVE NUISANCE,

Recovery by infant trespasser, 505-507.

AUCTIONEERS,

Liability of, for conversion, 377.

AVERMENT,

In actions for defamation, 301-303.

B

BAIL,

Right to arrest, 285.

BAILEE,

Liability, in tort or contract, 24.

For conversion, 377-379.

BAILOR,

Liability of, for wrong of bailee, 227-229.

BALLOON,

Trespass by, 349.

BANK,

Liability for failure to pay check, 23.

BATTERY,

Defined, 257, 258.

Defense of person, 258-262.

Property, 262-264.

Recaption, 265-270.

Enforcement of discipline, regulation and order, 270-272.

BIBLIOGRAPHY, 50, 51.

BLIND PERSONS,

Contributory negligence, 548, 549.

BOYCOTT,

See Interference with Contractual Rights.

C

CAPTAIN OF VESSEL,

Powers over crew and passengers, 271, 272, 283.

CARRIER,

See Railroad.

[The figures refer to pages]

CASE AND TRESPASS,

Actions in, 45-47.

CATTLE,

See Animals.

CAUSA PROXIMA NON REMOTA SPECTATUR, 77.**CAUSE, PROXIMATE,**

See Proximate Cause.

CHAMPERTY, 497, 498.**CHATTEL,**

Liability of maker or vendor, 517-520.

CHECK,

Liability of bank for failure to pay, 23.

CHILDREN,

See Infants.

CITIES,

See Corporations (municipal).

COLLOQUIUM,

In actions for defamation, 301-303.

"COMING TO A NUISANCE," 579.**CONDITION,**

Distinguished from cause, 101-103.

And see Proximate Cause.

CONFLICT OF LAWS,

Local and transitory actions, 240-243.

Transitory torts,

In general, 244-248.

Acts wrongful by *lex loci*, 248, 249.

By *lex fori*, 249-252.

CONSENT,

See License.

CONSPIRACY, 580-584.**CONSTABLE,**

Liability for unlawful levy, 153, 154.

CONTINGENT FEE,

Not champertous, 497, 498.

CONTRACTOR,

Liability of Employer, 214.

Wrongful work, 215, 216.

Dangerous work, 216-219.

Violation of duty, 219-221.

Reservation or exercise of control, 221-223.

Ratification, 223-225.

Lack of care in selection, 225.

[The figures refer to pages]

CONTRACT AND TORT,

See Tort (and contract).

CONTRACTUAL RIGHTS,

Interference with, see Interference with Contractual Rights.

CONTRIBUTION AND INDEMNITY,

Between joint wrongdoers, 237-239.

CONTRIBUTORY NEGLIGENCE,

See Negligence.

CONVERSION,

Defined, 370.

Distinguished from trespass, 371, 372.

Chattels subject to, 372, 373.

Nonfeasance insufficient, 373, 374.

Method of accomplishment,

Unlawful taking, 374, 375.

Purchase from thief, 375-377.

By servant, agent or bailee, 377-379.

Unlawful detention,

Demand and refusal, 379-381.

Quantum of plaintiff's interest, 381-383.

Defenses,

Return to supposed owner, 384.

Jus tertii, 384.

Offer to return, 385.

Damages, 386-388.

Election between suit in tort and contract, 28.

COPYRIGHTS,

Violation of, 32.

CORPORATIONS,

Injuries to, 135.

Liability of, municipal, 198-203.

Charitable, 204-206.

Noncharitable, 207, 208.

COUNSEL—ADVICE OF,

As constituting probable cause, 485-487.

COUNTIES,

See Corporations (municipal).

COURT AND JURY,

As determining proximate cause, 103, 104.

In actions for defamation, 344, 345.

Malicious prosecution, 483-489.

COVENANT NOT TO SUE, 123-127.**CREDITOR,**

Action for interfering to prevent collection of debt, 474, 475.

[The figures refer to pages]

CRIME AND TORT,

See Tort (and crime).

CRIMINAL CONVERSATION,

See Interference with Domestic Relations.

CRITICISM,

As defense to defamation, 323-326.

CROSSING TRACK OR STREET,

Duty to look and listen, 532-534.

CUJUS EST SOLUM EJUS EST USQUE AS COELUM ET AD INFEROS, 348.

CULPABLE MIND,

See Motive (and intent).

D

DAMAGE,

When essential, 69-75.

In defamation, see Defamation.

Duty to lessen, 539-541.

DAMAGES,

Not apportionable between wrongdoers, 236, 237.

For damages in particular cases, see the specific torts.

DAMNUM ABSQUE INJURIA, 7-9.

DEATH,

Abatement by, 117-120.

Action for, 32.

By whom brought, 38.

DECEIT,

See Fraud.

DEFAMATION,

Defined and classified, 292-294.

Defaming a class, 294-296.

Publication, 296-300.

Construction of language, 300-303.

Pleading, 301-303.

Slander,

Defined, 292.

Per se,

Charging crime, 304-307.

Charging disease, 308.

Prejudice to calling, 308-312.

Charging unchastity, 313.

Libel,

Defined, 292-293.

[The figures refer to pages]

DEFAMATION—Continued,

When damage presumed, 314-316.

With special damage, 316-318.

Complete defenses,

Truth, 319-322.

Fair comment, 323-325.

Privilege, 326-336.

Excess, 336-338.

Malice, 338-340.

Partial defenses,

Impeaching reputation, 341.

Character, 342.

Negating malice, 342, 343.

Retraction, 343.

Provocation, 344.

Province of court and jury, 344, 345.

DEFENSE,

Of self, 258-261.

Of another, 262.

Of property, 262-264.

DEFENSES,

Abatement, 117-120.

Accord and satisfaction, 120-123.

Acts of state, 107, 108.

Illegal conduct of plaintiff, 111-114.

License, 114-117.

Necessity, 106, 107.

Police power, 108-111.

Release and covenant not to sue, 123-127.

Statute of limitations, 127-131.

For defenses to particular torts, see the specific torts.

DEFINITION AND DERIVATION OF "TORT," 1.**DEMAND AND REFUSAL,**

As constituting conversion, 379-381.

DE MINIMIS NON CURAT LEX, 72.**DISCIPLINE,**

As excusing battery, 270-272.

Imprisonment, 285, 286.

DISTRESS,

Right of, 362, 363.

DOMESTIC RELATIONS,

Interference with, see Interference with Domestic Relations.

DRUNKENNESS,

As a defense, 164, 165.

[The figures refer to pages]

E

ELECTION OF REMEDIES,

In general, see Tort.

In particular cases, see the specific torts.

EMPLOYERS,

Liability for wrong of servant or agent.

Course of employment, 209-213.

Violation of duty, 213, 214.

Liability for wrong of independent contractor.

Wrongful work, 215, 216.

Dangerous work, 216-219.

Violation of duty, 219-221.

Reservation or exercise of control, 221-223.

Ratification, 223-225.

Lack of care in selection, 225.

EMPLOYERS' LIABILITY ACT, 40, 194.

ENTRY;

Forcible, and detainer, 267-270.

EQUITY,

Concurrent jurisdiction with law, 42-44.

For equitable relief in special cases, see the specific torts.

EX DAMNO SINE INJURIA NON ORITUR ACTIO, 9.

F

FALSE IMPRISONMENT,

What constitutes, 273-277.

Defenses.

Arrest under process, 277-282.

Without warrant, 282-285.

Discipline, 285, 286.

FELLOW SERVANTS,

Risk of negligence of, 188-194.

FELONY,

Arrest for, without warrant, 284, 285.

FENCES,

Spite, 68.

FIRE,

Care required, 525, 526.

Proximate cause in case of, 94-96.

Destruction to prevent spread of, 106.

FIRE ESCAPES,

Statutory obligation to maintain, 34, 39.

FORCIBLE ENTRY AND DETAINER, 267-270.

[The figures refer to pages]

FRAUD,

In general, 394, 395.

Elements, 396.

Statement of fact, 397.

Promise, 397.

Opinion, 398-402.

Silence, 402, 403.

Intent to cause action, 404, 405.

Action by plaintiff, 405-409.

Duty to investigate, 408, 409.

Falsity, 410.

Scienter, 410-416.

Damage, 416-418.

Election of remedies, 23, 394.

Vitiates license, 115.

Satisfaction, 122.

FRIGHT, 81-86.**G****GAS,**

Trespass by, 350.

GRANTEE,

Liability for nuisance, 568-570.

H**HISTORY OF TORTS, 47-49.****HUSBAND,**

Action by, for injuries to wife, 133-135.

Injuries to,

Abduction, etc., of wife, 458, 459.

Adultery with wife, 459-461.

Injury to wife's person, 461, 462.

Alienation of wife's affections, 462-464.

Liability for tort of wife, 165-168.

I**ILLEGAL CONDUCT,**

Of plaintiff as a defense, 111-114.

IMPUTED NEGLIGENCE, 551-554.**INDEMNITY AND CONTRIBUTION,**

Between joint wrongdoers, 237-239.

INDUCEMENT,

In actions for defamation, 301-303.

[The figures refer to pages]

INFANTS,

- Injuries to, 132.
- Liability of, 157-161.
- Right of parent to discipline, 270, 285.
- Trespassers, 505-507.
- Contributory negligence, 547, 548.
- Imputed negligence, 553, 554.
- And see Parent.

INJURIA SINE DAMNO, 70.

INNKEEPER,

- Duty to guests, 528.
- Receive travelers, 41.
- Power to eject guest, 272.

INNUENDO,

- In actions for defamation, 301-303.

IN PARI DELICTO POTIOR EST CONDITIO DEFENDENTIS, 237.

INSANE PERSONS,

- Injuries to, 132.
- Liability of, 162-164.
- May be restrained, 107, 285, 286.
- Contributory negligence, 548.

INTENT,

- Distinguished from motive, 58, 59.
- Of party wronged, 59.
- Of wrongdoer, 60-64.

INTERFERENCE,

- To prevent collection of debt, 474, 475.

INTERFERENCE WITH CONTRACTUAL RIGHTS,

- In general, 424, 425.
- Prospective contracts of employment, 426-436.
- Prospective contracts not of employment,
 - Nonlabor controversies, 437-441.
 - Labor controversies, 441-444.
- Existing contracts of employment, 444-449.
- Existing contracts not of employment, 449-456.

INTERFERENCE WITH DOMESTIC RELATIONS.

- Injuries to husband,
 - In general, 457.
 - Abduction, harboring or enticement, 458, 459.
 - Adultery, 459-461.
 - Injury to wife's person, 461, 462.
 - Alienation of affections, 462-464.
- Injuries to wife, 464-466.

[The figures refer to pages]

INTERFERENCE WITH DOMESTIC RELATIONS—Continued.

Injuries to parent, 467-471.

Damages, 471, 472.

Injuries to master, 478.

INTOXICATED PERSONS,

Liability of, 164, 165.

INVITED PERSONS,

Duty of land occupant to, 510-512.

J

JOINT WRONGDOERS,

Concurring cause, 97-100.

Liability,

In general, 229, 230.

Connivance, 230, 231.

Concert of action, 231.

Production of single injury, 231-233.

Relationship, 233.

Ratification, 234, 235.

Equal responsibility, 236.

Damage not apportionable, 236, 237.

Indemnity and contribution, 237-239.

Release and covenant not to sue, 123-127.

And see Conspiracy.

JOKER,

As a defense, 115.

JUDICIAL ACTS,

Liability for, 142-151.

JUDICIAL DUTIES,

Defined, 141.

JURY AND COURT,

As determining proximate cause, 103, 104.

In actions for defamation, 344, 345.

Malicious prosecution, 483, 489.

K

KEEPER,

Of animals, liability, 520-523.

L

LABOR UNIONS,

See Interference with Contractual Rights.

LANDLORD AND TENANT,

See Lessor.

[The figures refer to pages]

LANDOWNER,

Right of lateral support, 43, 516, 517.

Duties of, see Negligence; Nuisance.

"LAST CLEAR CHANCE," 543-547.

LATERAL SUPPORT, 43, 516, 517.

LEAVE AND LICENSE,

See License.

LESSOR,

Liability for lessee's wrong, 227-229.

Leasing unsafe premises, 501, 502.

Failure to repair, 502.

Nuisance, 567, 568.

For right of action for waste, see Waste.

LIBEL,

See Defamation.

LICENSE,

In general, 114-117.

As defense to trespass, 360-362.

LICENSEE,

Duty of land occupant to, 507-510.

LICENSOR,

Liability for wrong of licensee, 227-229.

Duty to licensee, 507-510.

LIMITATIONS,

Statute of, 127-131.

LIQUOR LAWS,

As creating cause of action, 83.

LOCAL TORTS,

See Conflict of Laws.

LOOK AND LISTEN,

Duty to, when crossing track or street, 532-534.

M

MAINTENANCE, 497, 498.

MAKER OF CHATTEL,

Liability of, 517-520.

MALFEASANCE,

Defined, 41.

MALICE,

See Motive.

In defamation, see Defamation.

In slander of title, see Slander of Title.

In malicious prosecution, see Malicious Prosecution.

[The figures refer to pages]

MALICIOUS PROSECUTION,

Distinguished from false imprisonment, 477, 478.

Elements,

Judicial proceeding, 478-482.

When deemed commenced, 480.

Probable cause, 482-487.

Advice of counsel, 485.

Malice, 487-489.

Favorable termination, 489-491.

Damage, 491-493.

MALICIOUS USE AND ABUSE OF PROCESS, 493-495.

MARRIED WOMEN,

Injuries to, 133-135.

Liability of, 165-168.

Enticement, etc., of husband, 464-466.

Adultery with husband, 466.

Injury to husband's person, 466.

MARRIED WOMEN'S ACTS, 134, 168.

MASTERS,

Existence of relation, 175-179, 209, 210.

Duty to servants,

Equipment and place to work, 179-182.

Competent fellow servants, 182, 183.

Necessary rules, 183, 184.

Warning of danger, 184-186.

Assumption of risk by servant, 186-194.

Statutory regulations, 194, 195.

Liability for servant's wrong.

Course of employment, 209-213.

Violation of duty, 213, 214.

Injuries to, by seduction, etc., of servant, 473.

Interfering with contract of service, see Interference with Contract.

MAXIMS,

Actio personalis moritur cum persona, 117.

Causa proxima non remota spectatur, 77.

Cujus est solum ejus est usque ad cælum et ad inferos, 348.

De minimis non curat lex, 72.

Ex damno sine injuria non oritur actio, 9.

In pari delicto potior est conditio defendentis, 237.

Ubi jus ibi remedium, 39.

Volenti non fit injuria, 287.

MENTAL ANGUISH, 81-86.

MENTAL ATTITUDE,

Of the party wronged, 59.

Of the wrongdoer, 60-69.

[The figures refer to pages]

- MERGER,**
 - Tort and crime, 6.
- MINE OPERATOR,**
 - Liability for wrong of licensed foreman, 210.
- MINISTERIAL ACTS,**
 - Liability for, 151-157.
- MINISTERIAL DUTIES,**
 - Defined, 141.
- MISDEMEANOR,**
 - Arrest for, without warrant, 283, 284.
- MISFEASANCE,**
 - Defined, 41.
- MISTAKE,**
 - No defense to defamation, 293, 294.
- MORAL DUTIES,**
 - Violation of, 7-10.
 - Assumption of, 11, 12.
- MOTIVE,**
 - Distinguished from intent, 58, 59.
 - Of party wronged, 59.
 - Of wrongdoer, 64-67.
 - Legality dependent upon, 67.

N

- NECESSITY AS A DEFENSE, 106, 107.**
- NEGLIGENCE,**
 - Defined, 499.
 - Distinguished from intentional wrongs, 499-501.
 - Elements,
 - Duty to exercise care, 501-503.
 - Of occupant of land,
 - To trespassers, 503-507.
 - Licensees, 507-510.
 - Invited persons, 510-512.
 - Owner or occupant of adjoining premises, 512-515.
 - Support of land, 516-517.
 - Maker or vendor of chattel, 517-520.
 - Keeper of animals, 520-523.
 - Standard of care,
 - In general, 523-526.
 - Employments requiring skill, 526-528.
 - Innkeeper, 528.

[The figures refer to pages]

NEGLIGENCE—Continued,

Common carrier, 528, 529.

Carrier of passengers, 530–532.

How determined, 532–535.

Res ipsa loquitur, 536–539.

Damage, 539.

Avoidable, 539–541.

Contributory,

In general, 541, 542.

In admiralty, 542.

Duty of plaintiff, 542, 543.

“Last clear chance,” 543–547.

Children and other incompetents, 547–549.

Persons in peril, 549–551.

When imputed, 551–554.

Burden of proof, 554–556.

NOISE,

Trespass by, 350.

NONFEASANCE,

Defined, 40.

False imprisonment by, 276.

Does not constitute conversion, 373, 374.

NOTARY,

Liability for false acknowledgment, 151.

NOVEL IMPRESSION,

Cases of, 49.

NUISANCE,

In general, 557, 558.

Attractive, recovery by infant, 505–507.

Distinguished from trespass, 558, 559.

Public and private, 560–563.

Per se and per accidens, 564–567.

Parties liable, 567–570.

Owner of premises, 228.

Remedies,

Abatement, 571–573.

Action at law, 573.

Action in equity, 574, 575.

Defenses.

Legislative authority, 575–577.

Prescription, 578.

“Coming to a nuisance,” 579.

[The figures refer to pages]

O

OBSTRUCTION OF LEGAL REMEDIES, 474-476.

ODORS,

Trespass by, 350.

OFFICERS, PUBLIC,

Liability of, 138-157.

OMISSION,

As constituting tort, 40-42.

Will not constitute conversion, 373.

OPINION,

As constituting fraud, 398-402.

ORDINANCE,

Violation of, as defense, 113.

As constituting negligence, 534, 535.

OWNER,

Liability for wrong of lessee, lessor, or bailee, 227-229.

P

PARENT,

Liability for child's torts, 158.

Injuries to parental relation,

Abduction, 467.

Harboring, 467.

Enticement, 467.

Seduction, 468-470.

Right to control services essential, 470.

When mother may sue, 470.

Damages, 471.

PARTIES,

Party wronged,

Assignees, 136, 137.

Corporations, 135, 136.

Infants, 132.

Insane persons, 132.

Married women, 133-135.

The wrongdoer,

Corporations,

Municipal, 198-203.

Charitable, 204-206.

Noncharitable, 207, 208.

Employers,

Wrong of servant or agent, 209-214.

Wrong of contractor, 214-225.

Husband and wife, 165-168.

CHAP. TORTS—44

[The figures refer to pages]

PARTIES—Continued,

- Infants, 157-161.
- Insane persons, 162-164.
- Intoxicated persons, 164, 165.
- Masters to servants, 175-195.
- Owners, lessors, licensees, and bailors, 227-229.
- Partners, 225-227.
- Public officers, 138-142.
 - Judicial and discretionary acts, 142-151.
 - Ministerial acts, 151-157.
- Servants and agents, 169-175.
- Joint and several liability, 229-239.

PARTNER,

- Liability for wrong of copartner, 225-227.

PATENTS,

- Violation of, 32.
- Where action brought, 38.

PERCOLATING WATER, 69.

PERIL,

- Acting under 56, 89-91.
- Contributory negligence, 549-551.

PERJURY,

- No action for, 476.

PERVERSION OF LEGAL REMEDIES,

- Malicious prosecution,
 - In general, 476.
 - Elements, 477.
 - Judicial proceeding, 478-482.
 - Probable cause, 482-487.
 - Advice of counsel, 485-487.
 - Malice, 487-489.
 - Termination of proceeding, 489-491.
 - Damage, 491-493.
- Malicious use and abuse of process, 493-495.
- Unauthorized suit in another's name, 496.
- Maintenance and champerty, 497, 498.

PHYSICIAN,

- Liability of, for unauthorized operation, 116.
- Duty of injured party to consult, 539-541.

PILOT,

- Liability of shipowner for wrong of, 210.

POLICE POWER, 108-111.

PRESCRIPTION,

- As authorizing nuisance, 578.

[The figures refer to pages]

PRIVACY,

Right to protection, 288-291.

PROCESS,

"Fair on its face," 154-156, 278.

Void, 278-281.

Irregular, 278-281.

Erroneous, 278-281.

Malicious use and abuse, 493-495.

PROMISE,

Not generally fraudulent, 397.

PROXIMATE CAUSE,

Analysis of rule, 76-79.

Concurring cause, 97-100.

Condition, accompanying, 101-103.

Court and jury, functions of, 103, 104.

Fire, arbitrary rule, 94-96.

Fright and mental anguish, 81-86.

Intervention—of natural force, 79-81.

Voluntary, 86-89.

Unforeseeable, 86-88.

Foreseeable, 88.

Involuntary, 89.

By irresponsible individual, 91-93.

By unconscious instrument, 93, 94.

PUBLICATION,

Of defamation, 296-300.

PUBLIC OFFICERS,

Liability of, 138-157.

Q**QUARANTINE, 109.****QUASI CONTRACT, 26-28.****QUASI JUDICIAL OFFICERS,**

Liability of, 150, 151.

QUASI TORT, 24.**R****RAILROAD,**

Duty to passengers, 530-532.

Shippers, 528, 529.

Transport, 41.

Power to eject passengers, 272.

RATIFICATION,

Liability, in general, 234, 235.

For wrong of contractor, 223-225.

[The figures refer to pages]

REAL PROPERTY,

Recovery of, by force, 267-270.

RECAPTION, 265-267.**REDRESS,**

Method of, in general, 42-44.

For methods in special cases, see the specific torts.

RELEASE AND COVENANT NOT TO SUE, 123-127.**REPUTATION,**

Injuries to, see Defamation.

RESCUE,

Action for, 475.

Injuries while engaged in, 90, 91, 550, 551.

RES IPSA LOQUITUR, 536.**RETRACTION,**

As defense to defamation, 343, 344.

RYLANDS v. FLETCHER,

Doctrine of, 512-515.

S**SATISFACTION, 120-123.****SCHOOLMASTER,**

Right to discipline pupil, 271, 285.

SEDUCTION,

Action by female seduced, 287.

Parent, 468-471.

Consent bars recovery, 116.

Damages, 471, 472.

And see Interference with Domestic Relations.

SELF-DEFENSE, 258-261.**SERVANTS,**

Liability of, in general, 169-175.

For conversion, 377-379.

Duty of master to, see Masters.

Liability of master for wrong of, see Masters.

SHERIFF,

Liability for unlawful levy, 153, 154.

SILENCE,

Not generally fraudulent, 402, 403.

SLANDER,

See Defamation.

[The figures refer to pages]

SLANDER OF TITLE,

In general, 419, 420.

Elements,

Publication, 420.

Falsity, 421.

Damage, 421, 422.

Malice, 422, 423.

SMOKE,

Trespass by, 350.

SPITE FENCES, 68.

STATE,

Acts of, 107, 108.

Right to sue, 136.

Liability of, 196, 197.

STATUTE,

Unconstitutional, no defense, 138, 139.

Violation as giving cause of action, 32-40.

As constituting negligence, 534, 535.

And see Tort (statutory).

STATUTE OF LIMITATIONS, 127-131.

STRIKES,

See Interference with Contractual Rights.

SUBORNER,

No action against, 476.

SUIT,

Unauthorized, in another's name, 496.

SUNDAY LAWS,

Violation of as a defense, 114.

T

TELEGRAPH COMPANIES,

Liability for mental anguish for delay in delivering telegrams,
85, 86.

TENANT,

See Lessor.

Liability for nuisance, 568-570.

TITLE, SLANDER OF,

See Slander of Title.

TORT,

Analysis of concept, 3.

Bibliography, 50, 51.

[The figures refer to pages]

TORT—Continued,

And contract, 12-32.

Election, 22-32.

Advantages, 25.

Waiver, 26-28.

Creating cause of action, 29-32.

Importance of form of action, 29-31.

Parties, 18-22.

And crime, 4.

Merger, 6.

Definition, 1.

Derivation, 1.

History of, 47-49.

Local, see Conflict of Laws.

Moral duties, 7-10.

Assumption of, 11, 12.

Redress, 42-44.

Statutory, 32-40.

Public and private duties, 33-35.

Duty to party injured, 35-37.

Creation of remedy, 37-40.

Transitory, see Conflict of Laws.

Violation of right, method of,

Act or omission, 40-42.

Unlawfulness, 10.

TOWNS,

See Corporations (municipal),

TRANSITORY TORTS,

See Conflict of Laws.

TRESPASS,

To land, 346-351.

To personalty, 351, 352.

Nature of right invaded, 353-356.

Ab initio, 356, 357.

Remedies, 358-360.

Defenses,

License, 360-362.

Distress, 362, 363.

Removing trespassing cattle, 363, 364.

Saving life and property, 107.

Obstruction of highway, 107.

Damages, 365-369.

Distinguished from nuisance, 558, 559.

TRESPASS AND CASE,

Actions of, 45-47.

TRESPASSERS,

Duty of land occupant to, 503-507.

[The figures refer to pages]

TROVER,

See Conversion.

TURNTABLE CASES, 505-507.

U

UBI JUS IBI REMEDIUM, 39.

UNAUTHORIZED SUIT IN ANOTHER'S NAME, 496.

UNBORN CHILD,

Injury to, 132, note.

UNCONSTITUTIONAL STATUTE,

No protection to officer, 138, 139.

UNFAIR COMPETITION,

See Interference with Contractual Rights.

UNITED STATES,

Injuries to, 135.

Liability of, 196, 197.

V

VENDOR OF CHATTEL, 517-520.

VOLENTI NON FIT INJURIA, 287.

VOLUNTARY ACTS,

Liability for, 53-58.

VOTE,

Deprivation of right to, 72, 151.

W

WASTE, 389-393.

WATER,

Percolating, 69.

WIFE,

See Married Women.

WILLFUL WRONGS,

Distinguished from negligence, 499-501.

Mental anguish, 86.

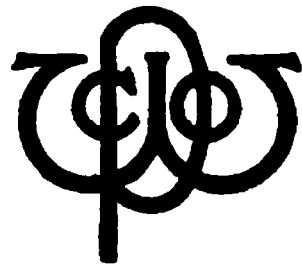
WITNESS,

No action against for perjury, 476.

And see Defamation (privilege).

WORKMEN'S COMPENSATION ACT, 195.

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TABLE OF CONTENTS

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- 6. The Law of the Case.**
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Same State.**
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- 4. The Relation Between Mineral Lands and the Public Land Grants.**
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- 6. The Relation Between Mineral Lands and the Various Public Land Reservations.**
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- 9. Definitions of Mining Law Terms.**
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- 12. The Location of Lode Claims.**
- 13. The Location of Mill Sites.**
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- 21. Subsurface Rights.**
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- Appendices.**

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7. Officers, Agents, and Employés.
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17. Same—Same.
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Chap.

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4. Liability of Master to Third Persons.
5. Common Carriers of Passengers.
6. Carriers of Goods.
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5. Powers of Partners.
6. Rights and Duties of Partners Inter se.
7. Remedies of Creditors.
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- '9. Actions Between Partners and Third Persons.
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TABLE OF CONTENTS.

Chap.

Part 1.—HUSBAND AND WIFE

1. Marriage.
2. Persons of the Spouses as Affected by Coverture.
3. Rights in Property as affected by Coverture.
4. Contracts, Conveyances, etc., and Quasi-Contractual Obligations.
5. Wife's Equitable and Statutory Separate Estate.
6. Antenuptial and Postnuptial Settlements.
7. Separation and Divorce.

Part 2.—PARENT AND CHILD.

8. Legitimacy, Illegitimacy, and Adoption.
9. Duties and Liabilities of Parents.
10. Rights of Parents and of Children.

Part 3.—GUARDIAN AND WARD.

11. Guardians Defined—Selection and Appointment.
12. Rights, Duties, and Liabilities of Guardians.
13. Termination of Guardianship—Enforcing Guardian's Liability.

Part 4.—INFANTS, PERSONS NON COMPOTES MENTIS, AND ALIENS.

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15. Persons Non Compotes Mentis and Aliens.

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TABLE OF CONTENTS.

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Chap.

- 1. Introduction.**
- 2. What is Real Property.**
- 3. Fixtures.**
- 4. Anglo-Saxon and Feudal Land Law.**

Part 2.—RIGHTS IN REAL PROPERTY.

- 5. Estates in Fee Simple.**
- 6. Estates in Fee Tail.**
- 7. Estates for Life.**
- 8. Life Estates Arising from Marriage.**
- 9. Homesteads.**
- 10. Estates Less Than Freehold—Estates for Years.**
- 11. Estates Less Than Freehold (Continued)—Tenancies at Will, from Year to Year, and at Sufferance.**
- 12. Joint Ownership of Estates.**
- 13. Conditional or Qualified Estates.**
- 14. Equitable Estates—Uses and Trusts.**
- 15. Estates in Expectancy.**
- 16. The Rule against Perpetuities.**
- 17. Easements, Profits à Prendre, Rents, and Franchises.**

Part 3.—MORTGAGES AND OTHER LIENS UPON REAL PROPERTY.

- 18. Mortgages.**
- 19. Mortgages (Continued.)**
- 20. Mortgages (Continued.)**
- 21. Liens Other Than Mortgages.**

Part 4.—THE ACQUISITION AND TRANSFER OF REAL PROPERTY.

- 22. Title in General.**
- 23. Title by Devise and Descent.**
- 24. Title by Official Grant.**
- 25. Restraints and Disabilities of Transfers.**
- 26. The Creation of Interests in Land by Powers of Appointment.**
- 27. Deeds and Their Requisites.**
- 28. Conditions, Covenants, and Warranties in Deeds.**
- 29. Abstracts of Title.**

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TABLE OF CONTENTS.

Chap.

- 1. What is Real Property.**
- 2. Tenure and Seisin.**
- 3. Estates as to Quantity—Fee Simple**
- 4. Estates as to Quantity—Estates Tail.**
- 5. Estates as to Quantity—Conventional Life Estates.**
- 6. Estates as to Quantity—Legal Life Estates.**
- 7. Estates as to Quantity—Less than Freehold.**
- 8. Estates as to Quality on Condition—on Limitation.**
- 9. Estates as to Quality—Mortgages.**
- 10. Equitable Estates.**
- 11. Estates as to Time of Enjoyment—Future Estates.**
- 12. Estates as to Number of Owners—Joint Estates.**
- 13. Incorporeal Hereditaments.**
- 14. Legal Capacity to Hold and Convey Realty.**
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- 16. Title.**

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TABLE OF CONTENTS.

Chap.

- 1. Formation of the Contract.**
- 2. Formation of the Contract—Under the Statute of Frauds.**
- 3. Effect of the Contract in Passing the Property—Sale of Specific Goods.**
- 4. Effect of the Contract in Passing the Property—Sale of Goods not Specific.**
- 5. Fraud, and Retention of Possession.**
- 6. Illegality.**
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Chap.

1. Definitions, Parties, Distinctions, and Classifications.
2. Formation of the Contract.
3. The Statute of Frauds.
4. Construction of the Contract.
5. Rights and Liabilities as Between the Creditor and the Surety.
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7. Rights and Liabilities of Co-Sureties as to each other.
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TABLE OF CONTENTS.

Chap.

Part 1.—GENERAL PRINCIPLES.

1. The Tort Concept.
2. General Principles—Legal Responsibility as Dependent upon Condition of Mind and Proof of Damage.
3. General Principles (Continued)—Liability under the Legal Rules Defining Cause and Effect.
4. General Principles (Continued)—Defenses.
5. General Principles (Continued)—Parties.
6. General Principles (Continued)—Parties.
7. General Principles (Concluded)—Conflict of Laws.

Part 2.—SPECIFIC TORTS.

8. Infringement of Personal Security.
9. The Right of Privacy.
10. Injuries to Reputation—Defamation.
11. Infringement of Private Property—Trespass.
12. Infringement of Private Property (Continued)—Conversion.
13. Infringement of Private Property (Continued)—Waste.
14. Infringement of Private Property (Continued)—Fraud.
15. Infringement of Private Property (Continued)—Slander of Title.
16. Infringement of Private Property (Continued)—Interference with Contractual Rights.
17. Interference with Domestic Relations.
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19. Negligence.
20. Nuisance.
21. Conspiracy.

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TABLE OF CONTENTS.

Part 1.—IN GENERAL

Chap.

- 1. General Nature of Torts.**
- 2. Variations in the Normal Right to Sue.**
- 3. Liability for Torts Committed by or with Others.**
- 4. Discharge and Limitation of Liability for Torts.**
- 5. Remedies.**

Part 2.—SPECIFIC WRONGS.

- 6. Wrongs Affecting Safety and Freedom of Persons.**
- 7. Injuries in Family Relations.**
- 8. Wrongs Affecting Reputation.**
- 9. Malicious Wrongs.**
- 10. Wrongs to Possession and Property.**
- 11. Nuisance.**
- 12. Negligence.**
- 13. Master and Servant.**
- 14. Common Carriers.**

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TABLE OF CONTENTS.

Chap.

1. Introduction—History of Wills.
2. Form of Wills.
3. Form of Wills (Continued)—Nuncupative—Holographic—Conditional Wills.
4. Agreements to Make Wills, and Wills Resulting from Agreement.
5. Who may be a Testator.
6. Restraint upon Power of Testamentary Disposition—Who may be Beneficiaries—What may be Disposed of by Will.
7. Mistake, Fraud, and Undue Influence.
8. Execution of Wills.
9. Revocation and Republication of Wills.
10. Conflict of Laws.
11. Probate of Wills.
12. Action for the Construction of Wills.
13. Construction of Wills—Controlling Principles.
14. Construction (Continued)—Description of Subject-Matter.
15. Construction (Continued)—Description of Beneficiary.
16. Construction (Continued)—Nature and Duration of Interests.
17. Construction (Continued)—Vested and Contingent Interests—Remainders—Executory Devises.
18. Construction (Continued)—Conditions.
19. Construction (Continued)—Testamentary Trusts and Powers.
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